

1-1998

The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France

Vivian Grosswald Curran

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol50/iss1/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Articles

The Legalization Of Racism in a Constitutional State: Democracy's Suicide in Vichy France

by
VIVIAN GROSSWALD CURRAN*

[P]eople have an easier time experiencing changes in domination than changes in laws.

- Portalis**

Table of Contents

Introduction.....	2
I. Historical, Biographical and Theoretical Overview.....	3
II. Prologue to Suicide: the July, 1940 National Assembly Debates.....	15
III. Legality and Legitimacy	24
IV. Antisemitic Legislation and the Role of Positivism.....	30

* B.A. Pennsylvania; M.A., M.Phil., Ph.D., J.D. Columbia; Assistant Professor, University of Pittsburgh School of Law. Unless otherwise indicated, translations are mine. I am grateful to those who read prior drafts of this manuscript, and who provided invariably helpful comments: Ann Begley, Denis Brion, Richard Buxbaum, Martha Chamallas, Pat Chew, Roger Curran, Howard Engelskirchen, Susan Fox, Bernard Hibbitts, Richard Kay, Jules Lobel, Robin Malloy, Robert Ronald, Rhonda Wasserman and Richard Weisberg. Parts of this article were presented as talks at meetings of the International Society for the Study of European Ideas (Utrecht, 1996); the Bar Association of the City of New York (New York, 1997); and the Twelfth Round Table of Law and Semiotics (State College, Pa., 1998). I wish to express my gratitude above all to my husband, Roger Curran, whose insights into the Vichy era have taught me much, and whose interest in Vichy France, the world of my parents, has been an unending source of consolation to me since their deaths.

"[L]es hommes changent plus facilement de domination que de lois." 14 *Discours préliminaire*, in 1 LOCRÉ, LA LÉGISLATION DE LA FRANCE 244, 251 (1827), quoted in LON L. FULLER, THE LAW IN QUEST OF ITSELF 32 (1940).

V.	The Multiplicity and Polysemicity of "True" Frances	45
VI.	Democracy's Post-Mortem: Vichy's Systems of Symbols	50
VII.	The Frayed Threads of Memory: Post-War Representations and Significations	58
VIII.	"Entering the Future Backwards": The Trial of Maurice Papon and the Judicial Solution to Understanding Vichy	73
IX.	The Contemporary Relevance of Vichy	94

Introduction

This article is the study of how a constitutional democracy can undermine itself from within, despite legal, constitutional and procedural safeguards designed to ensure self-perpetuation. The internal or voluntary road to destruction is only one of many paths that can lead to a democracy's demise. It is also the least visible process, and sheds light on the self-destructive tendencies embedded in the very structures of democracy.

The focal point of this study is France's Vichy régime, the fascist government of France from 1940 to 1944, named after the spa town of Vichy in which it acquired its legal existence through democratic means. Vichy was the seat of the new French government until 1944. I dwell in particular on Vichy France's antisemitic legislation and policy, as Vichy's antisemitism constitutes a dramatic example of policies and laws that appeared to invert, subvert and transform into their very opposites almost two centuries of constitutional guarantees and egalitarian principles.¹ Even in the

1. Throughout this piece, I call France a "constitutional democracy" in reference to attributes of law and justice that were official national traditions, and part of the French body politic and population's self-understanding since 1789. See ALEXIS DE TOCQUEVILLE, *L'ANCIEN RÉGIME ET LA RÉVOLUTION* 317 (1967; originally published in 1856). The term is justified in that it conveys to common law readers an approximation of fundamental systemic attributes which they will associate with constitutional principles, and which were a part of pre-Vichy France. The role of the Constitution in American social and legal consciousness is, however, dissimilar in many ways from the French experience. Much of what we associate with the Constitution in terms of the fundamentals of our system, the French associate with their Civil Code. They have changed constitutions twelve times, but still have the same (albeit amended) code that went into effect in 1804. For excellent discussions of this issue, see Pierre Legrand, *Strange Power of Words: Codification Situated*, 9 TUL. EUR. & CIV. L. FORUM 1 (1994); Pierre Legrand, *Civil Codes and the Case of Quebec: Semiotic Musings Around an Accent Aigu*, in SEMIOTICS AND THE HUMAN SCIENCES, 195, 202 (Roberta Kevelson ed., 1995) ("civil codes help to delineate a . . . national identity"); Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21 (1997); Martin A. Rogoff, *The French (R)evolution of 1958-1998*, 3 COL. J. EUR. L. 453 (1997-98); and Pierre Legrand, *Comparer*, 2 REVUE INT. DE DROIT COMPARÉ 279 (1996). France's republican existence also was interspersed with monarchies and empires emerging and reemerging before the advent of the Third Republic, the government in power before the Vichy

enactment and implementation of legalized racism, however, precisely where Vichy appeared to break most radically with France's past legal tradition, Vichy constructed itself from the nation's past as much as it broke with it.

Just as many of Vichy's roots lay in France's republican past, many of modern France's roots lie in its Vichy past. Coming to grips with Vichy involves connecting numerous, mutually incompatible tendencies that have defined France's various cultural communities, and that also coexisted within individuals. The point of such an exercise is not merely to conclude that complexity and contradictions abound, but to reveal how and why dominant political and legal patterns can shift so dramatically that eventually they undermine themselves.

France's institutional mechanisms for perpetuating democracy proved unequal to the task in the face of combined internal and external pressures. Contemporary issues in the United States, discussed under such rubrics as welfare reform, immigration reform, a growing wealth gap, homosexual rights, public school funding, and publicly funded vouchers for private school attendance, create similar potentials for constructing hierarchies and categories of excluded people, of *others* with lesser rights. The processes by which an excluded *other* is created can be unobtrusive, and disguised through a rhetoric that extols the very democratic principles and ideals which it serves to erode, or even through procedures originally designed to ensure fairness and egalitarianism.

In the coming years, increasingly vocal, diverse communities inevitably will raise still more issues of belongingness, exclusion, sovereignty and statehood, challenging democracy with implosion and explosion, in both the United States and the emerging Europe of the next millennium.² The study of Vichy France may be useful, as it encapsulates similar issues in another time, and illuminates the vulnerable and transformable propensities of legal and political theory in periods of crises.

I. Historical, Biographical and Theoretical Overview

France became a constitutional democracy pursuant to the French Revolution of 1789.³ In July of 1940, within weeks of France's defeat by the German army, democracy in France ended by a vote of democratically elected members of Parliament. As more fully

régime.

2. For an exceptionally thoughtful analysis of these issues in the context of the European Union, see J.H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995).

3. See generally DE TOCQUEVILLE, *supra* note 1.

discussed below, it was a voluntary act of self-destruction, as France's Parliament by an overwhelming majority of 569 out of 649 legislators, committed institutional suicide by voting itself out of existence and creating a dictatorship, all in careful compliance with the French Third Republic's legal procedure.⁴

I do not mean to underestimate the importance of Germany's military triumph over France, or of its looming influence as the imminently probable ruler of all of Europe. I mean, rather, to focus on the "Franco-French" nature of Vichy inasmuch as Vichy (1) entered into existence as the choice of autonomous political delegates proceeding under the French law of the Third Republic, not the law of Nazi Germany; and (2) legislated for a time under its own name, independently of the dictates of Nazi Germany.⁵ Many, if not most, French people may have perceived the country to have had no alternative to a collaborationist government.⁶ That too is part of

4. More specifically, the initial July 10, 1940 vote gave Marshal Pétain the power to create a new constitution. A new constitutional act two days later gave Pétain all governmental and legislative powers.

5. Indeed, in certain legislative matters, such as the definition of who was a Jew, the Vichy French laws were harsher than Nazi German equivalents, causing a delighted Dannecker, chief of the Gestapo's *Judenreferat* in Paris, to decree in the Occupied Zone that in doubtful cases, the Germans would follow the more inclusive Vichy definition rather than the narrower German Nuremberg law. For a fuller discussion of the Vichy French definition of who was a Jew, see *infra* note 77. On the Nazis' reasons for adopting a less inclusive stance in Germany itself, see NATHAN STOLTZFUS, *RESISTANCE OF THE HEART: INTERMARRIAGE AND THE ROSENSTRASSE PROTEST IN NAZI GERMANY* (1996). At least one scholar, Weil-Curiel, has suggested that French law was harsher for half-Jews than its German counterpart because Raphaël Alibert, who drafted the French legislation, harbored bitter hatred for a man who was a half-Jew. See Denis Broussolle, *L'élaboration du statut des juifs de 1940*, in *LE DROIT ANTISÉMITES DE VICHY*, 115, 125 (Maurice Olender ed., 1996) (hereinafter *LE DROIT ANTISÉMITES*). For similarly personal and petty motivations in Germany, among German politicians who unwittingly enabled Hitler to gain a stranglehold on power, see HENRY ASHBY TURNER JR., *HITLER'S THIRTY DAYS TO POWER JANUARY 1933* (1996). More generally, for a fascinating if sobering account of the role of chance and mistakes in the formation and development of law, see Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996); on the role of chance in history, see EDUARD MEYER, *ZUR THEORIE UND METHODIK DER GESCHICHTE* 3-11 (1902), cited in FRITZ RINGER, *MAX WEBER'S METHODOLOGY: THE UNIFICATION OF THE CULTURAL AND SOCIAL SCIENCES* 25 (1997).

6. The theory that France had no alternative but to collaborate may have been widespread among the French population as a motivation for embracing or accepting Vichy, but it was not necessarily the primary motivation of the Vichy régime itself. Throughout his prison journals, former Prime Minister Édouard for one insists that Pétain and his cohorts delivered France to the Germans, not because of France's military defeat or other necessity, but in order to destroy the Republic. See ÉDOUARD DALADIER, *PRISON JOURNAL, 1940-1945, especially at* 89, 113 (Arthur D. Greenspan trans., Westview Press 1995) (1991). Robert Paxton, the eminent Vichy historian, largely concurs with this conclusion: "Vichy's internal project—replacing the cosmopolitan and libertarian Republic by an authoritarian, homogeneous state—was revenge against the Popular Front

French self-understanding, for when the French adopted Pétain's *État français* in the absence of any German dictate, they were alone among the peoples of the western democracies overrun by the Nazis to make the choice of capitulating from within.⁷

By July of 1940, as the French democracy's Parliament was meeting for the last time, to legislate itself out of existence, my grandfather was one of thousands of refugees interned in French camps for enemy aliens. The son of a German judge who had been born Jewish but converted to Protestantism, my grandfather had started his professional life in the early 1900s as the owner of a bank in Berlin.⁸ In 1933, shortly after Hitler came to power, a servant denounced him to the Gestapo for criticizing the new régime. The ensuing Gestapo interrogation persuaded my grandfather to leave Germany. He emigrated to Paris in 1933, where prior business contacts enabled him to lead an active professional life, and to raise his family. In 1939, however, France declared war on Nazi Germany, and adult males from Germany were interned in camps as potential Nazi spies.

My grandfather experienced Vichy France from four French camps: Francillon, Cépo, les Milles and Gurs. His letters to my mother and the rest of his family are one of my sources for an individual's and a cultural community's experience of Vichy. The letters reflect his sense of France as a unified, harmonious entity, whose national identity was coterminous with the French Revolution's *Declaration of the Rights of Man*. Vichy in his eyes simply was not France. His numerous letters contain not a single

more than accommodation to some Nazi blueprint." ROBERT O. PAXTON, *VICHY FRANCE: OLD GUARD AND NEW ORDER 1940-1944*, at xii (1982 ed.) (1972). See also *id.* ("It was Pétain who wanted collaboration; Hitler wanted only booty."). Accord PAUL REYNAUD, *CARNETS DE CAPTIVITÉ: 1941-1945*, at 106 (1997) (Vichy-approved *Action française* glorification of French military leaders who opposed the Republic with far more vehemence than they had opposed the nation's enemy). See also *id.* at 166 for the statement by Vichy Minister of Justice Barthélemy that Vichy's legal enactments, as of April 15, 1942, were not the result of external, *i.e.*, German, pressure ("*Nous n'avons subi aucune pression . . . de l'extérieur . . .*").

7. The examination of Vichy's "Franco-French" aspects continues to discomfit and dismay. A new publication by Henri Amouroux, well-established French historian of the Occupation, reacts against the recent surge in French self-examination by seeking to reinstate German guilt as the focal point for analyzing Vichy. Significantly, Amouroux seems also to hope to close the discussion by presenting his new book as the last word on Vichy. The book is titled *Pour en finir avec Vichy*; loosely translated, *To Close the Discussion About Vichy*. See HENRI AMOUROUX, *POUR EN FINIR AVEC VICHY: LES OUBLIS DE LA MÉMOIRE* (1997). Cf. France's Minister of War's statement after Captain Dreyfus had been pardoned, but not yet rehabilitated: "*L'incident est clos*" ("The incident is closed").

8. For a detailed account of my grandfather's pre-war life, see ROBERT RONALD, *LAST TRAIN TO FREEDOM* (1997).

reference to the fact that Vichy was voted into existence freely by democratically elected French legislators.

I do not mean to belittle my grandfather's fervent belief in a one, true France. Many of his contemporaries shared it, including General de Gaulle, whose immutable vision of a unified France impelled him to carry on the military and political fight against Nazi Germany after most of his compatriots had abandoned the struggle.⁹

Indeed, the theme of the true France ("*la vraie France*") abounded in France during and after the Vichy period, with widely varying meanings depending on the categories and associations prevailing in each cultural community. I discuss various experiences, ideas and ideals of the "true Frances," based, *inter alia*, on contemporaneous journals and memoirs, the letters my grandfather wrote from French camps, and the many accounts my parents and other relatives and acquaintances gave of their lives in Vichy France.¹⁰ I hope to offer a pluralistic vision of the Frances that coexisted under Vichy. I focus on rival attempts to manipulate rhetoric so as to control meaning, and on the consequent post-war fraying of the threads of memory. I suggest the need to allow memory to be guided by the contexts of the times, and the concomitant need to discover and challenge some of the entrenched, obfuscatory categorizations into which the post-war world has furcated the history of Vichy.

The attempt to define and redefine France and Frenchness in terms of a unified whole has been itself a unifying factor in French history, and continues today. It is one of the unstated purposes of the contemporary French trials of accused Vichy collaborators.¹¹ The efforts of each successive French régime to project national harmony and unity have involved shifting categorizations, and exclusions of rejected discourses. National identity and self-representation are more vulnerable to dramatic transformations and subversions,

9. De Gaulle's exquisitely written war memoirs begin with the following disarmingly and deceptively simple words, "All my life, I have had a certain idea of France." ("*Toute ma vie, je me suis fait une certaine idée de la France.*") CHARLES DE GAULLE, MÉMOIRES DE GUERRE: L'APPEL: 1940-1942, 1 (1954). Literally translated, the sentence would be "all my life I have *made for myself* a certain idea of France." The French language does not necessitate his use of the reflexive verb, which connotes fabrication and construction of the idea of France for himself, connotations which are psychologically revealing. For further discussion of de Gaulle's conception and construction of the idea of France, see *infra*, notes 148 and 199-204, and accompanying text.

10. My mother grew up in France, fleeing the unoccupied zone with her family in August, 1941, at the age of seventeen. My father was studying in France when the war broke out. He fled from Paris to Montpellier on foot, a few hours ahead of the German troops, and left France about a year later, at the age of 29.

11. See *infra* notes 250 to 330, and surrounding text for an analysis of the trial of Maurice Papon.

however, to the extent they deny or discredit others' truths.

In July of 1940, the *État français*, a repressive, racist state, replaced the Third Republic under the dictatorship of Marshal Philippe Pétain, France's acclaimed World War I military hero, revered throughout the country as "*le vainqueur de Verdun*", the victor of Verdun. Once in power, he swiftly enacted laws that, among others, defined and progressively ostracized Jews, leading to the eventual deportation of an estimated 75,000 Jews from France, a figure which is both conservative and does not take into account the several thousands who died on French soil from starvation, disease and mistreatment in France's camps.¹² Of those deported from France, only 3% survived. Among the 75,000 deportees were 6,000 children under the age of twelve who did not return, including 2,000 under the age of six at the time of their deportation.¹³

Vichy buttressed its claim to legitimacy with curious and paradoxical sets of discourses that blended a rhetoric of continuity with the past with a rhetoric of rupture from the past through the creation of a much-touted "New Order" or "National Revolution."¹⁴ Vichy's rhetorical imagery of revolution involved further antinomy, at once implicitly evoking the 1789 French Revolution, while disavowing the Revolution as part of an allegedly corrupting liberal-Jewish influence that had introduced egalitarianism and individualism into French culture—influences Pétain's New Order sought to counter by rehabilitating purportedly pre-revolutionary Christian ideals of community ("*corporatisme*"), family, work and religion.¹⁵ Thus, the

12. See, e.g., SERGE KLARSFELD, *FRENCH CHILDREN OF THE HOLOCAUST: A MEMORIAL* viii (1996) (giving the number of deportees as 76,000); JOSEPH BILLIG, *LE COMMISSARIAT GÉNÉRAL AUX QUESTIONS JUIVES (1941-1944)*, at 13 (1955) (calculating that 74,000 Jews had been deported from France by March 6, 1943, *before* the deportations had begun from the southern zone). Nora Levin estimates a total of 80,000 Jews were deported from France and subsequently killed. See NORA LEVIN, *THE HOLOCAUST: THE DESTRUCTION OF EUROPEAN JEWRY 1933-1945*, at 458 (1968). Lucy Dawidowicz gives an estimate of 90,000. LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*, at 363 (1975).

13. PIERRE LABORIE, *L'OPINION FRANCAISE SOUS VICHY* 278 n.3 (1990).

14. Equally interesting issues of continuity and rupture arise with respect to Napoleon's relation to the French Revolution. Cf. PIERRE-BLOCH, *JUSQU'AU DERNIER JOUR*, 18 (1983) ("*je le tiens [Bonaparte] pour le continuateur des idéaux de la Révolution française*"); ROBERT GILDEA, *THE PAST IN FRENCH HISTORY* (1994). Both pro- and anti-revolutionaries evoked Bonaparte as their inspiration. See also JOSEPH BARTHÉLEMY, *MINISTRE DE LA JUSTICE: VICHY 1941-1943, MÉMOIRES*, 629 (1989) (text of Vichy Minister of Justice's speech to *Conseil d'État* on August 19, 1941, with approving comparison of Pétain to Bonaparte).

15. On the essentially feudal nature of the French ideal of *corporatisme*, see MARC BLOCH, *FRENCH RURAL HISTORY: AN ESSAY ON ITS BASIC CHARACTERISTICS* (Janet Sondheimer trans., Univ. of Calif. Press 1996); JOHN MARKOFF, *THE ABOLITION OF FEUDALISM: PEASANTS, LORDS AND LEGISLATORS IN THE FRENCH REVOLUTION*

shift away from individual rights proceeded under a façade of communalism.

The Third Republic's attention to its law and legal procedure in effecting its own demise in and of itself connotes continuity between the régime which signed its own death warrant and the one it spawned. The intermingling of symbols and rhetorics of continuity and rupture marked levels of both substance and form in Vichy, and allowed for Vichy's repressive and antisemitic measures to be accepted with less public discontent than a rhetoric solely of rupture with the past could have achieved.

The profusion of laws passed during the Vichy régime's shift towards hierarchy and exclusion also highlights the prodigious role of law and legal rhetoric in legitimizing, normalizing and sometimes disguising the most fundamental violations of traditional constitutional principles.¹⁶ Legal discourse itself provided apparent continuity because of the familiarity of the traditional language and linguistic structures of law. A fundamental shift in legal significances developed, but the novelty was less evident because of the appearance and form of continuity in the familiar contours of legal language, including the discourses of statutory language and scholarly commentary.¹⁷ Vichy thus poses the challenges of delineating form from substance, legality from legitimacy, and penetrating the labyrinthine effects of legal categorization on many levels.

Vichy's legal recategorizations eliminated France's Jewish minority from those who qualified as members of the new French body politic. Vichy officials and legal scholars argued that French law continued to preserve the fundamental, constitutional rights of full-fledged French citizens. According to this line of reasoning, fundamental constitutional protections had not changed. Rather, those entitled to them merely had been restricted to exclude people whose allegedly exploitative and destructive past conduct had marked them as alien in their essential natures from the French nation and people.¹⁸ This was one of Vichy's representations of continuity with

(1996); and Rogoff, *A Comparison of Constitutionalism in France and the United States*, *supra* note 1, at 46, 58.

16. See Richard Weisberg's groundbreaking work in this area. RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996) (hereinafter *VICHY LAW*); *Legal Rhetoric Under Stress: The Example of Vichy*, in RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE*, 143-182 (1992) (hereinafter *POETHICS*).

17. See *VICHY LAW*, *supra* note 16. See also PAUL DE MAN, *BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM* 11 (1983 ed.) (1971) ("It is the distinctive privilege of language to be able to hide meaning behind a misleading sign.").

18. See *infra* notes 19 and 76-84, and accompanying text.

France's Republican past.¹⁹

Thus, the régime sought to erase the new, fundamental violation of constitutional protections by keeping the old, constitutional constructs intact on the surface, merely changing the less structurally apparent *extent* of the familiar, entrenched protections. The official position, sanctioned by many constitutional law scholars, that nothing fundamental in the law had changed, was calculated to make palatable the new antisemitic laws, but completely ignored the logical imperative linking the *quantity* of individuals protected by constitutional rights to the substantive *quality* of the constitutional protections.²⁰

It is interesting to note, however, that initially, when it enacted the first of its antisemitic statutes, the October 1940 *statut des juifs*, the Vichy régime was too cautious even to argue that it had transformed Jews into an unprotected class. At that early stage, Vichy took particular pains to declare that Jewish persons and property remained fully protected by the new State, and that the purpose of singling out and defining Jews statutorily merely was to prevent continued Jewish exploitation of the French people. Thus, the régime stated that Jews would be eliminated or greatly restricted only from playing a role in the public sphere, and elsewhere where they allegedly represented a pernicious and dangerous influence.²¹

19. For the contrary effort by the 1789 French revolutionaries to exaggerate the Revolution's apparent break with the past, see Tocqueville, *supra* note 1, at 43 ("The French in 1789 made the greatest effort to which any people has ever dedicated itself, to so to speak cut in two their destiny, and to separate by an abyss what they had been heretofore from what they wanted to be henceforth. In this objective, they took all sorts of precautions to bring nothing from the past into their new condition; they imposed all sorts of constraints upon themselves so as to fashion themselves differently from their fathers; in short, they omitted nothing to render themselves unrecognizable. I have always thought that they succeeded far less in this singular enterprise than it generally has been believed.").

20. The extent to which United States law differentiates between legal immigrants' and citizens' constitutional protections raises some similar concerns. More generally, see J. M. Balkin, *Constitution of Status*, 106 YALE L.J. 2313, 2314 (1997) (discussing social stratification as creating "democracy in a profoundly undemocratic society"). See also Mary Ann Glendon, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION, 95, 113 (1997) ("Tyranny, as Tocqueville warned, need not announce itself with guns and trumpets. It may come softly—so softly that we will barely notice when we become one of those countries where there are no citizens but only subjects."). In addition to restricting the scope of existing constitutional protections, Pétain also enacted new constitutional measures, such as *l'Acte constitutionnel n° 7*, promulgated January 7, 1941, pursuant to which Pétain was empowered to investigate former cabinet ministers and other dignitaries, and to impose such criminal penalties as he deemed just, without the accused standing trial. See REYNAUD, *supra* note 6, at 31.

21. The following official French government press release appeared on the day before the *statut des juifs* was published: "The entire Government, in absolute sincerity, has refrained from taking any reprisals. It respects the physical persons and the property

In fact, however, the *statut des juifs* of October 1940 was only a prelude to other laws which were to abrogate all legal protection of Jewish persons and property, eventually and progressively subjecting every Jewish person on French soil to possible legal internment in camps, and delivery to the Germans for deportation and death. With respect to their property, Jews soon were subject to complete dispossession through the forced "aryanization" of virtually any property they owned, from bank accounts to chattels to businesses.²² The official governmental and scholarly justification for the "aryanization" of Jewish property was to eliminate Jews from affecting French economic life, and was rationalized by the allegation that this was necessary to protect France's economy, as their past influence had proven to be destructive to the French economy.²³

Vichy presents vividly the increasing momentum of a process that incorporated racist measures and ideologies in a society whose legal system purportedly had immunized it from the legal exclusion of minorities. France's capitulation was the dissolution of a constitutional democracy within the very legal framework designed to perpetuate it, and by a process that indisputably adhered to the procedural requirements of the very system targeting itself for destruction. This phenomenon was an extraordinary event, and bears on numerous contemporary issues of increasing interest, as our world becomes ever more attuned to the challenges diverse communities pose to constitutional democracies and to law's capacity for effectively protecting and including diverse constituencies.

Vichy France illustrates that the insidious potential for auto-destruction and for the legalization of racism is embedded within the very structures and institutions of constitutional democracy. This potential came to fruition in Vichy without a violent usurpation of authority, for the Vichy régime did not result from a military *coup*

of the Jews. It solely is preventing them from attaining certain public functions, of authority, managerial in nature, and of intelligence formation, experience having proven to it [*i.e.*, to the government], as it has to all impartial observers, that the Jews exercised those [functions, in the past] with a tendency to be individualistic to the point of anarchy." Reprinted in BILLIG, *supra* note 12, at 32. On Vichy's "economic rationalization of racism," see Broussolle, *supra* note 5, at 123. Claude Singer analyzes the reaction to racist legislation as uneasy, and notes a defensive quality in its apologists. See CLAUDE SINGER, *VICHY, L'UNIVERSITÉ ET LES JUIFS* (1992); accord, Danièle Lochak, *Écrire, se taire... Réflexions sur l'attitude de la doctrine française*, in *LE DROIT ANTISÉMITES*, *supra* note 5, at 433. For more general remarks on semantic reversions in totalitarian discourse, see HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951); JEAN-PIERRE FAYE, *LANGAGES TOTALITAIRES* (1973).

22. "Aryanization" refers to the forcible transfer of legal title to non-Jews of Jewish assets and businesses. The principal "aryanization" legislation enacted by Vichy is reprinted in Appendix 4 of *LE DROIT ANTISÉMITES*, *supra* note 5, at 590.

23. See *infra* notes 79 to 83 and accompanying text.

d'état, nor was it imposed by Nazi Germany. Indeed, France was the only western democracy subject to Nazi occupation in the wake of military defeat that had an official, indigenous government dedicated to collaborating with the occupier.²⁴

Vichy's example is of particular interest from a comparative perspective in that its exclusionary process was at once rapid and highly visible, displaying mechanisms of corrosion that are latent in most constitutional democracies, either lying dormant or functioning at lower levels of intensity, fluctuating from embryonic states to mere potentials, invisible but capable of surfacing should the necessary circumstances arise.²⁵

It is not my purpose to suggest that we can extract from a study of Vichy immutable, permanent laws that govern society, law, politics, or history. The complications, combinations and sheer number of phenomena comprising major societal shifts preclude reliable predictive generalizations in any permanent or absolute sense. Indeed, Vichy France, like Nazi Germany, stands at the heart of the twentieth century's refutation of Enlightenment faith that scientific laws govern the course of human events.

Rather, if we can learn from the example of Vichy, it necessarily will be an instruction of more modest proportions, shaped by the inquiry we undertake, and limited and defined by the inevitably contemporary perspectives, interests and concerns we bring to our study. Vichy allows us to observe how a constitutional democracy can contain within itself seeds of transformative shifts so potent as to metastasize and invert official national traditions of legal, social, political and human values.

Both Vichy and post-war French governments employed a technique of erasure to deal with events they did not acknowledge. They implemented this strategy through categorizations and recategorizations, rhetoric and silence. Recursive themes took on new meanings under each successive régime, as elements of prior categories were reshuffled into new categories, shifting associations unobtrusively but generating deep, underlying changes in significance. Thus, Vichy did not abrogate fundamental,

24. Cf. RAYMOND ARON, *MÉMOIRES: 50 ANS DE RÉFLEXION POLITIQUE* 706 (1983) ("alone among all the governments of the occupied countries, [Vichy] maintained that it was legal to the very end").

25. See Balkin, *supra* note 20, for a discussion of the tensions and paradoxes structurally inherent in constitutional democracies. For the necessity of the comparative perspective, see Pierre Vidal-Naquet, *The Shoah's Challenge to History*, in *THE JEWS: HISTORY, MEMORY AND THE PRESENT* 144 (David Ames Curtis trans. & ed., Columbia Univ. Press 1996) (1991) ("all history is comparative history, even when one does not think so"). For a discussion of varying understandings of the concept of democracy, see Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1 (1991).

constitutional Third Republic guarantees openly; rather, Vichy recategorized the population in France that henceforth was entitled to constitutional protections, so as to exclude France's minority Jewish population.

Similarly, both in his war-time conflation of himself with the nation of France, and in his post-war position that Vichy was null and void, de Gaulle attempted to erase Vichy from the national record, proclaiming that France only existed when it was a Republic, and, thus, that France from 1940 to 1944 had been embodied only by the Free French and the enemies of collaboration. De Gaulle recategorized Frenchness to exclude his Vichyite opponents, so that France became defined as a nation of Resisters, Vichy became synonymous with Germany, and the French body politic and population consequently could claim to have been blameless during the holocaust.

Similar reshuffling and recategorization are occurring today, as the trial of accused Vichy collaborator Maurice Papon has evidenced. The courts of France have assumed the task of constructing historical memory and national identity, a task which by their nature they are not equipped to accomplish. France's courts have been adjudicating historical, ethical and political issues. De Tocqueville famously wrote that in the United States political questions end up in the courts.²⁶ He contrasted this peculiarity to French practice.²⁷ Where Vichy is concerned, however, France has forced its judiciary to grapple with issues contorted and disguised in order to be deemed legally cognizable. France's courts have redefined the concept of the "crime against humanity" multiple times in an effort to immunize the Vichy government from judicial judgment.²⁸ The result has been frustration at judicial decisions inadequate because they are unresponsive to the unarticulated, underlying issues concerning Vichy that continue to weigh on French society. This article analyzes the Papon trial in terms of the inability of legal categorizations to memorialize and convey the role of Vichy in the holocaust. It also highlights the more general inability of judicial proceedings to convey historical truths, because judicial proceedings inevitably are processes of meaning creation.²⁹

Like the silence of its victims, in the post-war period Vichy became a presence all the more disquieting for its official absence. It became a palimpsest, a smothered subtext that has influenced the

26. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1994), especially *Judicial Power in the United States and Its Influence on Political Society*, at 98-105.

27. See *id.*

28. See *infra* text accompanying notes 270-282.

29. See *infra* notes 277-330 and accompanying text.

texts and textures of France's social, political and legal evolution for over half a century, even as superimposed layers sought to keep it unobtrusively beneath the surface. Vichy's unique aspects offer a rich interweaving of threads in the great tapestry of French legal, political and social history, while its derivation from a democratic ancestry suggests patterns of interest for the evolution and devolution of constitutional democracies.

Nazi Germany itself provides less of an opportunity than Vichy France to examine the role of a constitutional democracy's law and legal culture in its own demise, although numerous areas of similarity invite comparison between France's Third Republic and Germany's Weimar Republic. Weimar's democratic traditions were, however, more tenuous and of much more recent vintage than France's, and Weimar's transition to Nazism, unlike the French experience, did not result from a democratic process, but, rather, followed an alternative route to demise for democracies, through (1) President Hindenburg's increasing rule by emergency power;³⁰ and (2) Hitler's acts of violence, manipulative deception and illegality, consciously calculated to enable him to destroy Weimar.³¹

The contemporary fascination with Vichy France relates, I believe, to a desire to find an antidote against recurrent cataclysmic failures of democracy. Less clear, however, is the extent to which understanding can correlate with mastering events and controlling the

30. One can interpret the emergency powers in different ways. As part of Weimar, legal under the "authoritarian gap" of the Weimar constitution, they can be interpreted as comparable to Vichy's emergence pursuant to compliance with the Third Republic's legal procedure. On the other hand, they reveal that Weimar was not a truly parliamentary state, because of the power of the President to select the Chancellor and to dissolve the legislature. See PETER GAY, *WEIMAR CULTURE: THE OUTSIDER AS INSIDER* 151 (1970); TURNER, *supra* note 5. Weimar's authoritarian gap introduces a lacuna between democratic government and dictatorship that is absent in the French model. For a discussion of Weimar's authoritarian gap, see Otto Kirchheimer, *Legality and Legitimacy*, in *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER* 44-63 (William E. Scheuerman, ed. 1996) (hereinafter *THE RULE OF LAW*). For an English translation of Article 48 of the Weimar Constitution, granting the President emergency powers, see *THE RULE OF LAW*, *supra*, at 60-61 n.6.

31. Cf. Karl-Dietrich Bracher, *The Technique of the National Socialist Seizure of Power*, in *THE PATH TO DICTATORSHIP, 1918-1933: TEN ESSAYS BY GERMAN SCHOLARS* 118-119 (John Conway trans., 1966), *quoted in* GAY, *supra* note 30, at 163: "Stressing legality, Hitler made his way into the government not as the leader of a working, parliamentary majority coalition (as misleading apologists still suggest) but through the authoritarian gap in the Weimar Constitution, and immediately set about destroying the Constitution he had just taken an oath to defend." As Peter Gay puts it, Weimar's death was "part murder, part wasting sickness, part suicide." Gay, *supra* note 28, at xiii. *Accord*, Franz L. Neumann, *The Decay of German Democracy*, in *THE RULE OF LAW*, *supra* note 30, at 41 ("German democracy committed suicide and was murdered at one and the same time. A democracy without democrats found its end.").

future.³² My study of Vichy France and of Nazi Germany has persuaded me that the perpetuation of constitutional democracies cannot be correlated satisfactorily with having in place particular laws, constitutional or other, or with judicial methodologies or philosophies.

In this article, I discuss some of the paradoxical arguments that post-war critics have levelled against the French and German judiciaries under Nazi hegemony. I argue, contrary to post-war criticism, that judicial methodology and philosophy were neither the problem, nor the potential solution, in either France or Germany to the rabid injustice of the courts during the years of Nazi terror. Rather, both countries' judiciaries were forces of oppression largely because, in keeping with the rest of their institutional cultures, they lacked a pre-existing ethical commitment to inclusiveness, a lack more pronounced in Germany than in France, and one which both predated and postdated Hitler's régime.³³

Although it inevitably eludes precise definition and is subject to interpretive variation, a pre-existing individual and institutional ethical commitment to values of inclusiveness and non-discrimination

32. Cf. EUGEN WEBER, MY FRANCE: POLITICS, CULTURE, MYTH 297 (1991) ("explanation is also advanced at times as if it could help to prevent similar tragedies in the future. And it may be the last question one might wish to consider—whether that is not a form of naïveté"); LUDWIG WITTGENSTEIN, CULTURE AND VALUE 3e (G.H. von Wright ed., Peter Winch trans., 1984) ("When we think of the world's future, we always mean the destination it will reach if it keeps going in the direction we can see it going in now; it does not occur to us that its path is not a straight line but a curve, constantly changing direction."); FRITZ RINGER, MAX WEBER'S METHODOLOGY: THE UNIFICATION OF THE CULTURAL AND SOCIAL SCIENCES 4 (1997) (historians engage in heuristic projections of rationality and consistency onto past); JÜRGEN HABERMAS, *Can We Learn From History*, in A BERLIN REPUBLIC: WRITINGS ON GERMANY [DIE NORMALITÄT EINER BERLINER REPUBLIK] 5-13, and 43 (Steven Rendall trans., 1997) ("we can learn only from history seen as a critical authority. History as 'teacher' is an ancient topos; but the positive ways of reading this topos lead into the wilderness—we might have learned at least that much from our frequent misuse of history.") This article is, nevertheless, an attempt to "think with history," as Carl Schorske defines the concept, despite Schorske's association of modernism with ahistoricity. See CARL E. SCHORSKE, THINKING WITH HISTORY: EXPLORATIONS IN THE PASSAGE TO MODERNISM (1998).

33. For a superb analysis and overview of Germany's judiciary from the 1920s to the present, see INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., Harvard Univ. Press 1991). See also Otto Kirchheimer, *State Structure and Law in the Third Reich*, in THE RULE OF LAW, *supra* note 30, at 142-71; Otto Kirchheimer, *Legality and Legitimacy*, in *id.* at 44-63. For an excellent discussion, see also Mark Osiel, *Dialogue With Dictators: Judicial Resistance in Argentina and Brazil*, 20 L. & SOC. INQUIRY 481, 489 (1995) (lack of causal connection between legal philosophy and case outcomes); accord BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATSRECHTSORDNUNG IM NATIONALSOZIALISMUS 99 (1968); MARC LINDER, SUPREME LABOR COURT IN NAZI GERMANY: A JURISPRUDENTIAL ANALYSIS 3 (1987).

is the single strongest correlate for the existence and perpetuation of constitutional protections.³⁴ Widespread popular commitment to inclusiveness is necessary for the implementation through governmental institutions of an ethics or philosophy of inclusiveness.³⁵ As Ernst Cassirer wrote in 1945, referring to Plato's transformation of the Socratic ideal of "eudaimonia" into the sphere of political life,

[t]he self-preservation of the state cannot be secured by its material prosperity nor can it be guaranteed by the maintenance of certain constitutional laws. Written constitutions or legal charters have no real binding force, if they are not the expression of a constitution that is written in the citizens' minds. Without this moral support the very strength of a state becomes its inherent danger.³⁶

The history of Vichy France suggests the extent to which the all-important constitutions "written in the citizens' minds" are subject to flux and erosion.

II. Prologue to Suicide: The July, 1940 National Assembly Debates

Vichy France was a system of polysemic symbols created both constructively and destructively from the system of symbols of its predecessor, the Third Republic. Vichy elicited a new orthodoxy with new disciples, yet its relation with its Republican past was characterized at rhetorical and substantive levels by a complex interplay oscillating between continuity and rupture with the past. No less significant is the rhetoric, at once pompous and moving, elegant and elegiacal, of the last Parliament as it consciously sang its

34. On the importance of preexisting beliefs to the perpetuation of states, see JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* (1762).

35. See Christopher T. Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 MICH. L. REV. 123, 145 (1987) (discussing the importance of "securing a stable commitment to a philosophy (or its results) from the majority, since without their reliable assent the philosophy cannot be implemented *through legitimate institutions*") (emphasis in original), and criticizing Rawls and Nozick for overlooking the problem of difference and even mutual incompatibility between (1) small-scale individual or group acceptance of some philosophical positions and (2) wide-scale societal acceptance of them).

36. ERNST CASSIRER, *THE MYTH OF THE STATE*, 76 (1946). Cf. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 20 (1924) ("the relative fixity of concepts affords men with a specious sense of protection, of assurance against the troublesome flux of events"). In this context, an amusing but telling anecdote about the world-famous mathematician Gödel is apposite. Before his U.S. citizenship hearing, Gödel, a refugee from Nazism, had read the U.S. Constitution with a mathematician's searching precision. At his hearing, Gödel had to be restrained by well-wishing friends from explaining to the presiding judge how "according to the Constitution, the very axioms of democracy, the United States could legally be turned into a dictatorship." BRUCE SCHECHTER, *MY BRAIN IS OPEN: THE MATHEMATICAL JOURNEYS OF PAUL ERDŐS* 114 (1998).

swan song, in tune with the complex, vibrant roles language historically has played in French public life and tradition.³⁷ As more fully discussed below, France's Parliament in 1940 participated in a tradition centuries old by proclaiming the very principles and goals it was in the process of destroying.

The last parliamentary debates are uniquely well-situated to illustrate the process of democracy's demise.³⁸ Parliament followed the democratic processes by which a democracy, abiding by its own internal procedure, can abdicate and extinguish itself. It also formulated mutually incompatible conceptions of Vichy's future identity, involving, among other elements, both repudiating and embracing Nazi domination, and both repudiating and embracing France's Republican (and therefore, implicitly, Revolutionary) ideals and traditions. The debates illuminate the subversion of representative government through political subterfuge and chicanery designed to manipulate public opinion by (re)constructing for posterity a fictitious version of events even as they were occurring. Finally, the debates illustrate and foreshadow the use of rhetoric in creating shifting systems of classification.

Parliament's conduct not only influenced, but also reflected in microcosm, the country's widespread initial responses to the unexpected and bewildering twin traumas of France's military defeat and Germany's invasion, responses of capitulation tinged with hope and shame, and marked by a residual national exhaustion from France's massive losses of the first World War. The contradictions and paradoxes which emerged in the French National Assembly's final, suicidal debates contained many seeds which were to germinate

37. See PIERRE NORA, 1 REALMS OF MEMORY xvi (Arthur Goldhammer trans., Columbia Univ. Press 1996) (1992) (discussing the relation in France between language and national identity); GEORGE STEINER, ERRATA, AN EXAMINED LIFE 31 (1997) (describing French secondary education as conveying "[t]he sovereignty of language" and describing the French language as "even in its lyricism, a public medium").

38. Although in my opinion a tremendously rich and revealing source for studying Vichy, the parliamentary debates have not elicited much analysis or interest to date. Typical is the following disparaging comment by Marcel Prélôt, an honorary rector, law professor, Vice President of the Commission of Constitutional Laws of the French Senate, and member of the Assemblies of the Council of Europe and of the Union of Western Europe, in what generally has been considered a seminal treatise on French political institutions and constitutional law: "the National Assembly session [of July 10, 1940] was more or less of no interest." MARCEL PRÉLOT, INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL 492 (1969). Prélôt summarized the debates as follows: "In the first part, only procedure was discussed; in the second . . . the report of Boivin-Champeaux was heard, then, rapidly and without debate, the vote was reached with the huge majority of 596 votes against 80." *Id.* The 1969 edition to which I cite was the book's fourth edition, published by Dalloz, one of France's two principal legal publishers. As of this writing, the book has undergone an eleventh edition.

both during and after the Vichy period, as Vichy sought to establish an identity based on inherently incompatible themes. Vichy proclaimed rupture with the past in the form of a new, revolutionary society and government. It simultaneously proclaimed continuity with the past; cooperation and partnership with a Nazi Germany represented as friend and savior; and yet also protection of France from a Nazi Germany represented as an enemy and conqueror.³⁹

Aiming to achieve a smooth and unobjectionable transition of power, Pierre Laval appeared at the last parliamentary debates of France's Third Republic. Trained as a lawyer, Laval was Pétain's representative in Parliament, and would soon become his second in command. Pétain had formed a new government as Prime Minister under the ægis of the Third Republic the previous month, on June 16, 1940, when Prime Minister Paul Reynaud resigned.⁴⁰ Thus, when the French Parliament met in July of 1940, it was to create a Pétain dictatorship, not to install him as head of the existing governmental structure.

Both Laval and Pétain hoped to confer legitimacy on the new Vichy régime by attending to procedural legality, and impressing the population with the outgoing Parliament's appearance of unity. Several novel procedural issues arose, due to the exceptional nature of the times and of the proposals on the table. The first problem involved how to tabulate the parliamentary vote. Article 8 of the soon-to-be-defunct Constitution of 1875 required a majority vote for any constitutional amendments:

The two Chambers shall have the right, by separate deliberations, taken in each by a vote of absolute majority, either spontaneously, or on the demand of the President of the Republic, to declare that there is cause to amend constitutional laws.

After each of the two Chambers has so resolved, they will

39. In keeping with these paradoxes, later Vichy pronouncements would vilify the leaders of France's Third Republic both for having entered the war against Germany, and for having lost it. See REYNAUD, *supra* note 6, at 65-66 (Vichy radio propaganda attacking Reynaud for having gotten France into a war that served only England's interests, causing French soldiers to die at Churchill's behest); DALADIER, *supra* note 6, at 89 (Daladier blamed for causing France to enter the war); *id.* at 109 (Daladier blamed for causing France to lose the war).

40. The new government's first act was to negotiate an armistice with the invading Germans and to take France out of the war. After Pétain became dictator in the Vichy régime, he took the position that Vichy was the government of all of France, although the German military occupied about three-fifths of France. After the war, the opposite claim was heard: namely, that Germany had governed all of France. In November of 1942, the German army invaded the formerly unoccupied region, thereafter occupying all of France. Pétain remained the head of the continuing Vichy régime until the Liberation of France in August of 1944. It should be noted that when Pétain was asked to form a government in June, 1940, he was not even a member of Parliament, and therefore had no electoral mandate whatsoever.

meet in the National Assembly to proceed to revise.⁴¹

The Constitutional requirement of an absolute majority could be interpreted to mean a majority based on members present at the time of the vote, or it might require a majority of all those *entitled* to vote, whether present or absent. If the votes of the absent members were counted in the denominator of the formula, then the democratic passage to dictatorship might be undermined by, at the very least, a vote of approval that nevertheless was too small to establish the impression of overwhelming agreement and solidarity. Laval and Pétain sought to manipulate the vote to be as close to unanimous as could be achieved.

The issue of absent members was acute because numerous members of Parliament had been unable to reach Vichy for various reasons. Those reasons included the terrible difficulties of travel after the German invasion and the consequent massive, road-clogging, invasion-triggered southward exodus of nine million people, hoping to escape the occupying forces;⁴² the fact that some members at the time were prisoners of war of the Germans; and, finally, that a group of some twenty to thirty members of Parliament was in North Africa, as part of what was known as the *Massilia* expedition.

Boivin-Champeaux, a member of Parliament who agreed with Laval in favoring a tabulation of the majority based only on those actually present, stated that "the drafters of the 1875 constitution could not have imagined that we would be meeting under

41. Article 8, Para. 1 and 2, Constitutional Law of 25 February 1875. ("*Les Chambres auront le droit, par délibérations séparées, prises dans chacune à la majorité absolue des voix, soit spontanément, soit sur la demande du président de la République, de déclarer qu'il y a lieu de réviser les lois constitutionnelles. Après que chacune des deux Chambres aura pris cette résolution, elles se réuniront en Assemblée nationale pour procéder à la révision.*")

42. There are innumerable accounts of the mass exodus from north to south. See, e.g., HENRI AMOROUX, *LA VIE DES FRANÇAIS SOUS L'OCCUPATION* 9-16 (1961); SIMONE DE BEAUVOIR, *LA FORCE DE L'ÂGE II*, at 505 (1960). Among the unpublished accounts is one by my father, who, like millions of others, fled south on foot. He wrote day-by-day accounts of his journey from Paris to Montpellier, under the strafing of the *Luftwaffe*, amid the chaos and clutter of a country of instant refugees, and through the beauty of the French countryside, to which he never tired of returning in later years. Based on circulating rumors and misinterpretation of overhead plane activity, his letters reflect hope in the possibility of continued French military resistance at a time when, for all practical purposes, it already was over. Also included are diverting and sometimes stimulating intellectual conversations about wide-ranging subjects when chance put him in proximity with another scholar in flight. My father's entries were written on whatever scraps of paper he could find, in the form of letters to reassure his worried parents in Bucharest. My grandfather had these letters typed into a little book. In 1952, my grandparents were able to emigrate to the United States. Among the few possessions they were able to bring with them was my father's war-time account. The manuscript is in French, but copies can be made available.

circumstances so tragic.”⁴³ Many applauded his motion to discount the absent.⁴⁴ Indeed, some of his colleagues in the National Assembly who agreed with him urged that the absent members of Parliament on the *Massilia* expedition had forgone the right to be counted. They discussed the *Massilia* group as though it consisted of traitors who had deserted France. That group included Georges Mandel, former Prime Minister Édouard Daladier, and numerous others who wished to continue the war from French North Africa.⁴⁵

Édouard Herriot courageously took the floor of the National Assembly to expose that the Pétain government had sent the *Massilia* expedition out of France for North Africa on June 21, where the participants had hoped to continue the fight against Germany, and that he, Herriot, personally had delivered the government's order to the men to leave for North Africa. Moreover, the absent parliamentary members of the *Massilia* expedition had sent a telegram to the National Assembly, protesting the government's holding a session of Parliament without allowing them to return to attend it, for the *Massilia* men vainly had been trying to return since they first learned of the scheduled parliamentary debates, but their efforts had met with the government's obdurate refusal to grant them permission to return to France. Herriot thus exposed Pétain and Laval's plot to discredit their political opponents, by first distancing them from France and then preventing their return.⁴⁶

43. Texts of Parliamentary Debates, reprinted in EMMANUEL BERL, *LA FIN DE LA III^E RÉPUBLIQUE: 10 JUILLET 1940*, at 322 (hereinafter sometimes *Parliamentary Debates*).

44. *See id.*

45. For a complete list of the *Massilia* passengers, see PHILIPPE SIMONNOT, *LE SECRET DE L'ARMISTICE: 1940*, at 281-85 (1990) (Among them were one professor of law, Paul Bastide, and the 75-year-old widow of Fernand Crémieux, after whom the pre-war, anti-racist *loi Crémieux* had been popularly named). The *Massilia* group understood that Pétain was prepared to accommodate the Germans on French soil, but believed that the government would establish itself in French North Africa, and continue the war from there. Pétain never had any intention of continuing the war if an armistice could be negotiated, however, almost regardless of the terms imposed. General Weygand, Commander of the French military forces, opposed accepting certain terms (such as turning over the French naval fleet to the Germans), but, like Pétain, Weygand swore never to leave the soil of France. When Hitler did not demand the French fleet or Empire, Pétain and Weygand hastened to sign the armistice. For further background information surrounding these events, see generally *Armistice!*, in WILLIAM L. SHIRER, *THE COLLAPSE OF THE THIRD REPUBLIC: AN INQUIRY INTO THE FALL OF FRANCE IN 1940*, at 852-900 (1969); MARC FERRO, *PÉTAIN* (1987); DALADIER, *supra* note 6; REYNAUD, *supra* note 6, at 57-58 n.96.

46. *See Parliamentary Debates, supra* note 43, at 315 for the text of the *Massilia* telegram, which the President of the National Assembly read aloud. *See also id.* at 316 (“M. Edouard Herriot: ‘Nos collègues sont partis sur des instructions régulières du Gouvernement . . . qui leur ont été par moi transmises et dont je garde le texte.’”). *See also*

Confronted with Herriot's personal testimony before the National Assembly, Laval admitted that the men had gone to North Africa with the government's knowledge and blessing, but protested the incident's being raised at all during the debates. He stressed that, unlike the *Massilia* group, a loyal Pétain had declared from the start that *he* intended to stay among his fellow countrymen, and that indeed Laval himself already had had occasion to say that it was not by leaving France that one could serve her.⁴⁷ This argument was to be repeated *ad infinitum* throughout the Vichy years to discredit as deserters those who joined de Gaulle's forces in London or North Africa. Laval also claimed that the normally slow pace of governmental bureaucracy accounted for the government's failure to grant the *Massilia* men permission to return to France, refusing to characterize the absence of permission as the unyielding governmental denial of permission to return it clearly was.⁴⁸ In fact, after deceiving the *Massilia* group into leaving for Morocco by leading them to believe that he would be continuing the fight against Germany from North Africa, Pétain would proceed to have two of the most prominent, Daladier and Mandel, arrested in North Africa and brought back to France to stand trial.⁴⁹

DALADIER, *supra* note 6, at 2 ("On June 30, Members of Parliament were prevented from boarding ship and returning to France . . . in order to deny them the possibility of voting in Vichy.").

47. See *Parliamentary Debates*, *supra* note 43, at 317.

48. *Id.* at 315-17.

49. See DALADIER, *supra* note 6, at 113. For an illuminating analysis of one of the ensuing trials, see Léon Blum, *The "Stranger" at Riom: Legalized Ostracism and Vichy's Political Trial*, in VICHY LAW, *supra* note 16, at 6-36. Once Pétain gained dictatorial powers, most of the legislators who had voted against him were imprisoned and some were murdered. In his prison journals of 1941-1945, Paul Reynaud, the last prime minister of the Third Republic before Pétain, refers to the cases of Marx Dormoy, socialist Minister of the Interior from 1936 to 1938, imprisoned after he voted against Pétain on July 10, 1940 and later murdered by the *Cagoule*; Vincent Auriol, socialist deputy, imprisoned in September, 1940, two months after the vote; Jean Zay, radical party deputy, imprisoned in Riom after his vote against Pétain; Joseph Denois, moderate deputy (and also member of the *Massilia* expedition), imprisoned in 1942; Louis Noguères, socialist deputy, also imprisoned after his negative vote; and Auguste Champetier de Ribes, Under-Secretary of State 1939-1940, who voted against Pétain and was arrested in 1942. See REYNAUD, *supra* note 6, at 33 n.43, 43 n.68, 56 n.96, 60 nn.98, 99, 115 n.189. Léon Blum also had overcome harrowing obstacles in order to attend the July 10 assembly, where he cast his vote against Pétain. His subsequent imprisonment at Riom was attributable to more than just his July 10 vote, however, as described in VICHY LAW, *supra* note 16. Some of those arrested, including Blum, had committed other acts for which Vichy also wanted to imprison them. At the time de Ribes was arrested, he was leading the Resistance in the Béarn region. See REYNAUD, *supra* note 6, at 115 n.182. Similarly, Marx Dormoy had ordered the arrest of the leaders of the terrorist *Cagoule* in 1937. See *id.* The *Cagoule* was an extremist right-wing organization established in 1936. For an overview of that organization, see the entry for "*Cagoule*" in I GRAND LAROUSSE EN 5 VOLUMES 477 (1989).

Ultimately, Parliament sided with Laval, and decided not to count its absent members for purposes of computing whether there was a majority vote, and, if so, the size of that majority.⁵⁰ It was careful, however, to cast this result as an application of Article 8 of the Constitution of 1875, based on objective legal interpretation thereof, and not as a substantive decision of the legislature stemming from political motives.⁵¹

Laval sought to enhance the legitimacy of the parliamentary vote. To that end, he suggested further prestidigitation with the numbers. His suggestion was to count *only* those members both present, and who exercised their right to vote. Those who were not present at the actual vote, whatever their reasons might be, and those who were present but abstained, were to be erased from the record: "It is . . . only a question of how we calculate the majority. Are you not of the opinion, in the interest of the country, that it is better to show France and the world that the majority the Government will be getting in a few moments, is a significant one?"⁵²

This was the first of many attempted erasures—aimed at defining memory, redefining truth, and controlling meaning—that characterized both Vichy and post-war renditions of events. Repressed truths later reared their heads in other ways, however. An extreme example of erasure would occur during the later Vichy years, when local precincts were instructed to obliterate from their registries all references to Jews who had lived there as soon as they were deported. In this manner, no record of their lives would remain, and, consequently, no record of their deaths.⁵³ After the war, de Gaulle and his successors attempted to erase Vichy itself by redefining it out

50. *Parliamentary Debates*, *supra* note 43, at 322.

51. *See id.*

52. "Il s'agit . . . simplement du calcul de la majorité. N'estimez-vous pas, dans l'intérêt du pays, qu'il vaut mieux montrer à la France et au monde que la majorité, que le Gouvernement va recueillir tout à l'heure, est importante." *Parliamentary Debates*, *supra* note 43, at 321.

53. *See* GEORGE CLARE, *LAST WALTZ IN VIENNA: THE RISE AND DESTRUCTION OF A FAMILY, 1842-1942*, at 243 (1980). *See also* KLARSFELD, *supra* note 12, at xiii ("The act of recording was misleading, since the final goal . . . was total disappearance of the deportees. And whatever the outcome for Germany, victory or defeat, . . . French archives on the arrest and internment of Jews were destined to be kept secret. . . . At the Liberation, the Prefecture of Police in Paris destroyed almost all its voluminous archives on the arrests of Jews, and in addition quietly transferred the family and individual files from the Prefecture's Jewish registry, and files on Jews arrested in Paris, to the Ministry of Veterans and War Victims Affairs [where they would be much harder to identify].") Erasures also saved lives during Vichy. The mayor of the town in southern France in which Gertrude Stein and Alice B. Toklas resided reportedly erased their names from the town records to protect them from the Gestapo. *See* SUSAN ZUCCOTTI, *THE HOLOCAUST, THE FRENCH AND THE JEWS* 47 (1993).

of French history. As with the psychological process of denial, the erased in their silence eventually would penetrate to the surface. The passage of time, however, put them at the mercy of memory's representations.⁵⁴

A second issue arose at the National Assembly debates in which parliament used a rhetoric designed to invoke continuity with the past in order to break with the past. The new issue concerned whether the proposed constitutional amendment itself should be studied by a special commission. The motion to form a special commission was brought by de Courtois, who based his motion not on a constitutional requirement, but on a precedent the National Assembly had established in 1926 that a Constitutional Commission be designated to study proposals for constitutional amendments.⁵⁵ A commission was duly formed.

In submitting the Commission's report, its chair made the following pronouncement that it was a free Parliament which was ending freedom, and employing a democratic process to end democracy: "I believe it my duty to make a solemn declaration here, in the name of my colleagues. *The act which we are accomplishing today, we accomplish freely.*"⁵⁶ In the course of this speech, he also made a connection between the Republic and Vichy, warning against a new constitution that might abrogate France's traditional Republican freedoms: "The image of France would not be complete if there did not appear in it certain liberties for which so many generations have fought."⁵⁷ The Senate Reporter went so far as to state that "it is not without sadness that that we bid adieu to the Constitution of 1875. It made France a free country . . . It dies less from its own imperfections than from the failings of the men who were put in charge of its progress and functioning."⁵⁸

Other members of Parliament also emphasized that the changes they were enacting were not intended to induce France to imitate the Germans, but rather, on the contrary, to prevent the Germans from

54. See *infra* notes 293 to 331 for a discussion of memory and the issues involved in judicial representations of memory. In a prime example of category-shifting, Laval reportedly said in 1942 that "we're in the midst of a worldwide revolution. There is a choice to be made between fascism and Bolshevism. *And when I say Bolshevism, I mean democracy as well.*" DALADIER, *supra* note 6, at 144 (emphasis added).

55. *Parliamentary Debates*, *supra* note 43, at 324.

56. *Id.* at 327 (emphasis added).

57. "*L'image de la France ne serait pas complète s'il n'y figurait pas certaines libertés pour lesquelles tant de générations ont combattu.*" *Id.*

58. "*Ce n'est pas sans tristesse que nous disons adieu à la Constitution de 1875. Elle avait fait de la France un pays libre . . . Elle se meurt moins de ses imperfections que de la faute des hommes qui avaient été chargés d'en assurer la marche et le fonctionnement.*" Reprinted in FERRO, *supra* note 45, at 129.

"taking hold of the French soul," and Pierre-Étienne Flandin, who was soon to be an enthusiastic collaborator with the Nazi occupier, even went so far as to criticize Laval for having appeared to suggest otherwise.⁵⁹ Even Laval's rhetoric was for preserving France, despite the concerted and fully conscious objective of the assembled Parliament to opt for German domination.⁶⁰

In sacrificing the democratic structure of government, Parliament seemed to be saying that democracy would survive, and could only survive, in the safekeeping of Pétain, and that, in creating a dictatorship, Parliament's purpose was to preserve what it was destroying. Indeed, the last parliamentary debates included much praise for all that was unique about France, and for the new government which allegedly would preserve it. One also finds, however, more cursory references, both prescient and nostalgic, to the impending end of free speech, intermingled with professions that the National Assembly had ensured France's continuity, as well as flowery statements to the effect that, although Parliament itself would be an institution of the past, its members, soon to be stripped of their function, nevertheless stood ready as ever to continue serving the nation.⁶¹

The parliamentarians' rhetorical style of evoking the unity of French republican tradition in the paradoxical context of effecting the end of that tradition is reminiscent of the French nobles' statements in the *cahiers de doléances* of the 1789 Revolution: sweeping commitments to renounce privileges followed by minutiae which undermined and generally extinguished the import of the initial declarations.⁶² Thus, France's Parliament in 1940 participated in a long-standing rhetorical tradition by evoking and advocating the very concepts it was working against.

In the midst of such sentiments and sentimentality, the

59. See *Parliamentary Debates*, *supra* note 43, at 310-11.

60. See *id.* The next day Laval reportedly cynically declared, "[t]his is how to assassinate a Republic." ("*Voilà comment on assassine une République*"), quoted in FERRO, *supra* note 45, at 132. According to Stanley Cohen, it is because Laval spoke those words that he was sentenced to death after the war. Stanley Cohen, *Vichy France and Its Lessons for Contemporary Professional Practices*, panel discussion of the Bar Association of the City of New York, October 23, 1997. By 1942, when the context had changed and Parliament already had been defunct for three years, Laval would adopt a more openly pro-German stance, declaring in a speech his explicit hope that Germany would win the war. For Laval's June 22, 1942, speech, see FERRO, *supra* note 45, at 402-403. Daladier reports in his diaries that Laval made a similar expression of hope in German victory at a press conference in December of 1942. See DALADIER, *supra* note 6, at 175. Moreover, Laval had been a pro-German defeatist in 1917 as well as in 1940. See REYNAUD, *supra* note 6, at 22.

61. See *Parliamentary Debates*, *supra* note 43, at 328-29.

62. See MARKOFF, *supra* note 15, at 81.

Commission approved, and the legislators adopted, the following constitutional amendment:

The National Assembly gives all powers to the Government of the Republic, under the authority and the signature of Marshal Pétain, for the passage of a new Constitution of the French State.

That Constitution shall guarantee the rights of work, family and country.

It will be ratified by the nation and applied by the Assemblies which it will have created.⁶³

According to Plato, both states and individuals choose their own fates or, as he put it, their "demons."⁶⁴ France had chosen its demon. After the passage of the constitutional amendment was announced, Laval dramatically thanked the Assembly in the name of Marshal Pétain, on behalf of France.⁶⁵ When Marcel Astier, one of the few who had voted against the proposal, cried out "*Vive la République, quand même!*" ("Long live the Republic anyway!"), his voice was drowned out by the throng of his newly anti-Republican colleagues, calling, "*Vive la France!*" The Republic had died.

III. Legality and Legitimacy

Scholars and politicians have argued that Vichy was illegal, based on alleged defects in the parliamentary proceedings. Nobel laureate and legal scholar René Cassin argued that, even if the legislators were entitled to reform the Constitution in July of 1940, they were not entitled to delegate that right to Pétain. His position was that their delegation of what they alone were constitutionally authorized to do was illegal, rendering the new Constitution and Vichy null and void.⁶⁶

If accepted, this argument ironically would also have delegitimized de Gaulle's 1958 mandate, for de Gaulle had the legislature amend Article 90 of the Constitution to delegate to the Executive the power to further amend the Constitution. Indeed, Jean-Louis Tixier-Vignancour, one of Pétain's staunchest supporters in 1940, decried de Gaulle's conduct in 1958 as illegal, illustrating the political shift (what J.M. Balkin has coined an "ideological drift") from 1940 to 1958: In 1940, it was the anti-Gaullists who supported as fully legitimate the executive's assumptions of the power of constitutional amendment; by 1958, the positions were exactly

63. *Parliamentary Debates*, *supra* note 43, at 323.

64. See PLATO, *REPUBLIC*, 346 (Francis MacDonald Cornford trans., 1941) ("The blame is his who chooses; Heaven is blameless.")

65. *Parliamentary Debates*, *supra* note 43 at 331.

66. See FERRO, *supra* note 45, at 133. René Cassin had been a professor of law, as well as France's delegate to the League of Nations and president of the French Veterans' Union. He joined de Gaulle in June, 1940. See REYNAUD, *supra* note 6, at 74.

reversed.⁶⁷

Vichy's legality has also been attacked on the ground that Article 121 of France's constitution forbade making peace with an occupying enemy.⁶⁸ Similarly, Article 75 of the Criminal Code criminalized intelligence with the enemy.⁶⁹ Following this reasoning, Pétain's government was illegal because its avowed purpose was to make peace with Germany. One might also date the illegality later. This theory would be that it was only after July 10, 1940, when Parliament gave Pétain the power to form a new constitution, that the constitutional laws of the Third Republic ceased to be in effect.⁷⁰ Under this view, the law of July 10 was null and void by virtue of its illegality. On the other hand, it must be remembered that the procedures of the Third Republic were followed with respect to the July 10 vote: Parliament had been duly convened, and the proposal for constitutional revision was approved by a large majority.

A somewhat weaker argument has been advanced to the effect that Vichy lost its legal status because it violated its own law. The law of July 10 provided for constitutional acts to be ratified by the nation, and applied by assemblies to be created, but Pétain neither submitted his constitutional acts to the nation to be voted on, nor did he create assemblies.⁷¹ This argument appears to be the least compelling basis for refusing governmental status to Vichy, because it assumes Vichy's legitimacy *a priori*, until Vichy violated its own law. In positing that Vichy ceased to be legal through Pétain's noncompliance, it concedes Vichy's initial legality.

Another argument, which rests more on political theory than law, is that France's democratically elected legislators had a mandate to represent the electorate of a republic, to participate in the

67. For a fascinating discussion of the phenomenon he calls "ideological drift," see J.M. Balkin, *The Footnote*, 83 N.W.U.L. REV. 275 (1989); and J.M. Balkin, *Ideological Drift and the Struggle Over Meaning in Legal and Political Theory*, 25 CONN. L. REV. 869 (1993) (hereinafter *Ideological Drift*). For the text of the speech Tixier-Vignancour made in opposition to de Gaulle, see HENRI ROUSSO, *THE VICHY SYNDROME* 69-70 (Arthur Goldhammer trans., 1991). (Tixier-Vignancour also served as the lawyer for Céline, the vociferously antisemitic French writer tried for treason after the war. See Angelo Rinaldo, *Céline: d'un chat l'autre*, in *l'Express*, 75-76 (June 11, 1998)). The concept of nationalism also underwent ideological drift, having a left-wing character at the time of the French Revolution, and a right-wing conservative one by the time of Vichy. Nationalism in France continued to be associated with the left into the nineteenth century. See RAOUL GIRARDET, *LE NATIONALISME FRANÇAIS* 17 (1966).

68. See Dominique Rousseau, *Vichy a-t-il existé*, in JUGER SOUS VICHY 98 (Maurice Olender ed., 1994).

69. See CODE PÉNAL [C. PEN.] art. 75 (Fr.) (effective 1939). After the war, numerous collaborators were convicted for having violated Article 75.

70. See Rousseau, *supra* note 68.

71. See *id.*

democracy that was its fundamental and defining characteristic, not to end the Republic. Under this view, their vote on July 10, 1940, would have been an act of treason, and consequently invalid and illegal.

The French anti-positivist legal doctrine of *principes généraux*, which recognizes super-eminent, unwritten governing principles of law that need not be expressed in any enacted law, would further seem to support the view that even democratically elected legislators are not free to legislate democracy out of existence. The *principes généraux* are guiding principles meant to preserve the tenets and spirit at the heart of the French system of law and government, even in the uncharted territory of times of crises.⁷² The doctrine of *principes généraux* is a judicial doctrine, however, and, as such, is inapplicable to French legislative acts, because in France there is no constitutional control over legislation. In recent years, the *Conseil constitutionnel*, the Constitutional Council, may be said to have acquired extensive, if not official, powers of judicial review,⁷³ but the tradition since Revolutionary times in France has been to privilege legislative acts as deriving from the ultimate authority of the popular will, and to relegate the judiciary to an inferior status.

Even in name, the judiciary was (and remains) a mere *autorité* ("authority"), while the other branches of French government are *pouvoirs* ("powers").⁷⁴ The judiciary is thus reduced both in nomenclature and in substance to a position of inferiority with respect to the legislature, and has no official control over it.⁷⁵ Moreover, the French judiciary consistently has refrained from applying *principes généraux*, at least openly, no doubt because court decisions based on unwritten principles would be subject to criticism as constituting judge-made law.⁷⁶ The grounds for denying the legality of the July 10 vote on the basis of the general principles of French law therefore appear to be highly dubious.

The membership of Vichy's legal, judicial and administrative sectors, as well as the laws in effect, largely were unchanged from the Third Republic. Consequently, it is hard to excise Vichy from France's historical trajectory by characterizing it as an illegal

72. See RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY*, 137-41 (Stevens & Sons Ltd., 2d ed. 1978) (1968).

73. See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* (1992).

74. See LA CONSTITUTION [CONST.], arts. 64-66 (Fr.) (October 4, 1958).

75. For a discussion of the French judiciary's inferiority relative to the other branches of government, see RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY*, 27-28 (Michael Kindred trans., La. State Univ. Press 1972) (1960).

76. See Guiseppe Federico Mancini & David T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 COLUM. J. EUR. L. 397, 399-400 (1995), ascribing the French judicial dislike of *principes généraux* to "a French aversion for all that is hazy or flexible."

anomaly. Vichy functioned because the Third Republic's functionaries remained as the functionaries of Vichy. Other than those who were ousted from their posts for being Jewish (or for being "non-Aryans" in the case of descendants of Jews who professed the Christian faith⁷⁷), the cast of characters from the Third Republic who decided cases, who wrote scholarly legal commentary, who argued in court, and who enforced the law, by and large remained the same under Pétain. Pétain was careful to emphasize continuity in order to buttress his government's claims to legitimacy. Thus, the first antisemitic law was drafted by Raphaël Alibert, who had been a well known and highly esteemed professor of constitutional law and the *maître des requêtes* of the Constitutional Council for almost twenty years before the war. Pétain made Alibert his first Minister of Justice.⁷⁸

Vichy's continuity with the Third Republic operated on the levels of both the judicial and legislative processes, but, paradoxically, Vichy often was most distinguishable from the Third Republic where it appeared to be most similar. Those laws and regulations that most fundamentally and flagrantly violated the concept of law as it had developed in France since the Revolution, were assimilated into the existing legal corpus by their treatment as laws like any others.⁷⁹ Scholarly commentary on antisemitic laws proliferated, but did not address the implications of their antisemitic, unconstitutional nature. Given that scholarly commentary in France has an incomparably

77. The distinction I make here between being "non-Aryan," as opposed to Jewish, was not drawn by Nazi or Vichy antisemitic law with respect to those whose parents were born Jewish. On the contrary, the dehumanization process that was to culminate in mass murder began with the law's indifference to an individual's personal beliefs. People were defined as Jews by virtue of their parents and grandparents (*i.e.*, their genetic heritage), personal religious faith being deemed irrelevant. The antisemitic laws themselves, however, ultimately *did* resort to individual professions of faith and religious observance for determining a grandparent's classification, and in direct contradiction to Nazi proclamations of the racial basis of Jewishness. For example, under French antisemitic law, an individual was a Jew if more than two grandparents had been Jewish, or if two grandparents and the individual's spouse were Jewish, even if the individual herself had been baptized at birth and had been a practicing Catholic all her life. If, however, an individual had two Jewish grandparent and one "Aryan" grandparent, she would be deemed "Aryan" if she could establish that the fourth grandparent had been a practicing Catholic. Thus, ironically, the classification of the fourth grandparent, on which the grandchild's "racial" classification and, hence, right to life hinged, was based on the grandparent's religious faith and conduct, not on criteria related to race or genes.

78. For Alibert's pre-war connections to the extreme right wing, see DALADIER, *supra* note 6, at 23 n.43.

79. Two formidable studies have been devoted to this process. See POETHICS, *supra* note 16, at 127-43; Danièle Lochak, *La Doctrine sous Vichy ou les mésaventures du positivisme*, in LES USAGES SOCIAUX DU DROIT, 252-285 (Danièle Lochak ed., 1989); see also, more generally, VICHY LAW, *supra* note 16.

greater influence than in common law legal systems on understanding and defining the law, as well as on its development through judicial application, scholarly legal commentary might have, one would like to think, jolted the French legal field during the Vichy period into open rebellion against measures deeply at odds with centuries of French legal tradition.⁸⁰ It did not do so, however. Legal, including constitutional, scholars chose instead to analyze the new laws in terms of their application and construction, and always within a comfortably familiar discourse of legal scholarship and analysis that assimilated them into the existing body of law, thereby implicitly sanctioning them. The laws themselves were not treated as aberrational. They were treated as though brought about by compelling social and political circumstances. Over forty books of legal commentary were published in the four years of Vichy. Virtually none condemned the antisemitic laws and regulations as being contrary to French law.⁸¹ The new antisemitic laws spawned a new area of legal scholarship, with new legal "experts" analyzing and interpreting the legislation. Legal periodicals accordingly created new categories: "Jews," "Jewish Matters," and "Jewish issues."⁸²

French legal scholars emphasized an allegedly protective function of the antisemitic laws, rather than their discriminatory or exclusionist functions. Thus, the dean of the Sorbonne law school wrote that "[i]n France, after the national Revolution [i.e., of Pétain], an antisemitic tendency appeared, not motivated by racial hatred, but by the nefarious role which certain Jewish politicians and financiers had played in the Third Republic."⁸³

Similarly, the dean of the Bordeaux law faculty wrote that the exclusion of Jews from the professions was "a measure in the general interest and not a punishment; [and thus] compensation shall be

80. The French legal system, in typical civil law fashion, does not recognize *stare decisis*. Scholarly legal commentary is an important influence on judicial decisions. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION*, 59-60 (1969) ("The teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of the professors."). Accord, André Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 469 (1976) (describing civil-law law as "a law of law teachers.")

81. Three exceptions have been noted by Dominique Gros, *Le Droit antisémite de Vichy contre la tradition républicaine*, in JUGER SOUS VICHY, *supra* note 68, at 18 and 27 n.1: Jean Carbonnier's note of July 9, 1943, published in 1944 by Dalloz; Jean Waline's *Droit Administratif*, volume 8; and his *Guide des conférences et exercices pratiques, pour la license en droit, exercice no. 12*, published by Sirey in 1944. See also Lochak, *supra* note 79, at 256-57.

82. See Dominique Gros, *Les "questions juives", une "matière nouvelle" pour des juristes vichyssois, in Peut-on parler d'un "droit antisémite"?*, in LE DROIT ANTISÉMITÉ, *supra* note 5, at 22-25.

83. GEORGES RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, t.II, 170-184 (1943), quoted in Gros, *supra* note 82, at 16.

granted to the affected [Jewish] civil servants [who lose their jobs].”⁸⁴ This impassive, objective, neutral, scientific tone generally was adopted by French legal scholars. The very lack of any apparent animus against targets of the antisemitic legislation facilitated the conceit that excluding Jews was normal, and entirely permissible from a legal perspective. As Danièle Lochak puts it, “[t]he exclusion of the Jews did not appear [in legal scholars’ writing] as an objective dictated by racial hatred or political vindictiveness, but rather as something normal, self-evident, whose rightness was beyond discussion.”⁸⁵ Lochak emphasizes that the same scholars who critiqued every other law they discussed generally refrained from giving their opinion about antisemitic laws. She concludes that their effort to maintain a neutral stance caused a dulling of their critical faculties.⁸⁶

Although brilliant in many respects, Lochak’s analysis blames positivism; *i.e.*, the power of law to command obedience by its very existence, for the French scholarly refusal to protest the antisemitic laws, and for endowing them with legitimacy.⁸⁷ For the reasons more fully developed in the next section, I conclude that positivism principally provided a camouflage for the problem, but did not cause it. This conclusion is consistent with the fact that the same professors who refrained from offering critiques of the antisemitic legislation were ready to judge the moral worth of other laws, as Lochak herself notes.⁸⁸ Rather, the scholarly silence couched complicity. Lochak seems to valorize this conclusion elsewhere: “[I]sn’t it a fact that this legislation did not fundamentally go against their convictions?”⁸⁹

Positivism’s role was far smaller than most post-war scholars have allowed. Principally, positivism played a role because the laws in question enjoyed initial social approval when they were enacted. The fact of the laws’ existence further promoted their implementation by the courts and citizens’ compliance. The framework of initial

84. ROGER BONNARD, *PRÉCIS DE DROIT PUBLIC*, 466 (1944), *quoted in* Gros, *supra* note 82, at 16.

85. Danièle Lochak, *La légitimation de la politique antisémite, in Écrire, se taire . . . Réflexions sur l’attitude de la doctrine française*, in *LE DROIT ANTISÉMITES*, *supra* note 5, at 436.

86. *See id.* at 437. Max Weber seems to have foreseen the dangerous potentials for education posed by cloaking value-laden ideas under a style of neutrality: “The overt preaching of political creeds . . . seemed to [Weber] less dangerous to the students’ autonomy than the covert suggestion of ideologies in nominally ‘dispassionate’ ways.” RINGER, *supra* note 32, at 132.

87. *See* Lochak, *supra* note 85, at 436 (“Positivism categorically rejects any reference to an alleged natural law and correlatively refuses to subordinate the validity of a legal order to a judgment about its moral worth.”).

88. *See id.* at 437.

89. *Id.* at 450.

social approval was, however, essential.

IV. Antisemitic Legislation and the Role of Positivism

The argument blaming positivism in Vichy France has been put forth most persuasively by Lochak, who focuses on the catastrophic consequences of lawyers and judges trained to apply, implement, obey and uphold the law merely because it is the law, no matter what the law may be.⁹⁰ I differ with Lochak's interpretation of positivism's role for the reasons set forth below, although her view is consistent with post-war criticism, particularly of Nazi Germany.

The problem with blaming positivism is the impossibility of defining it adequately, for it is subject to interpretations as varying as the countless permutations of legislative interpretation. In both Germany and France, positivism in the sense of the impetus to obey the law as it is, was subject to mutually incompatible interpretations, because the laws themselves contradicted each other. In Germany, for instance, while the Criminal Code required assistance on behalf of anyone targeted for premeditated murder, other laws prohibited people defined as "Aryans" from any direct personal dealings with those defined as "non-Aryans."⁹¹ Technically, this would not have precluded "Aryan" citizens from informing the authorities, rather than Jews themselves, of projected murders of Jews. Nevertheless, the substantially contradictory import of the different laws casts doubt on even the possibility of practicing a pure positivism.⁹²

I do not accept the view that an otherwise innocent population and judiciary merely implemented the law because they had been trained to do so. More precisely, to the extent that the law did influence judicial and individual conduct, I do not accept the view that a judicial theory of unreflective application of the law, or a popular philosophy of unreflective obedience to it, were major independent constituent factors in shaping the course of events. I believe that positivism did play some role, but its influence was both relatively minor and part of a dialectical movement of mutual influence, indissociably interacting with pre-existing social approval

90. See Lochak, *supra* note 79, at 252-285; Danièle Lochak, *Le juge doit-il appliquer une loi inique*, in JUGER SOUS VICHY, *supra* note 68, at 29-39; Lochak, *supra* note 85, at 433-462.

91. See, e.g., the diary of Victor Klemperer, entry of July 19, 1943, recounting that one form of dissent in Nazi Germany (which endangered the lives of Jews as well as of the dissenters) was to greet and shake the hand of anyone wearing a yellow star. VICTOR KLEMPERER, *ICH WILL ZEUGNIS ABLEGEN BIS ZUM LETZTEN: TAGEBÜCHER 1942-1945*, at 406 (1995).

92. More generally, for a discussion of the interpretive difficulties inherent in statutory construction, see George Taylor, *Structural Textualism*, 75 B.U.L. REV. 321 (1995).

of the legislation.

The laws of both Vichy France and Nazi Germany did not fall fortuitously on unwilling or unwitting populations and judiciaries. The judiciaries applied laws which on the whole had met with judicial approval, just as the populations followed laws which on the whole had met with popular approval.⁹³ Thus, it was in the context of a general sense of acceptance of the spirit of the new laws that the judiciaries under Pétain and Hitler *also* tended to apply the law because it was the law, just as the citizenries of France and Germany, initially generally receptive to the new laws, *also* tended to obey the law because it was the law. However, this tendency was only one factor operating within a more complex framework, composed of reciprocally influential habits of adherence to existing law and generalized approval of government policy.

In France, antisemitism in public discourse was sufficiently subtextual that, according to former Minister of Justice Robert Badinter, Jacques Charpentier, who was head of the Paris Bar in 1940, declared after the war to Badinter that Pétain's régime had not taken antisemitic measures before 1942, the year the Germans occupied the entire country, and more than two years after Vichy's inception.⁹⁴ In fact, close to 150 laws, decrees and regulations concerning Jews were enacted by the Vichy régime, and approximately 600 Jews were prosecuted for violations of those laws.⁹⁵ Judges restricted themselves to focusing on whether their

93. For a book devoted to the subject of French public opinion during the Vichy years, see LABORIE, *supra* note 13. With respect to popular approval in Germany, see SAUL FRIEDLÄNDER, *NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION, 1933-1939*, at 164 (1997) ("the bulk of the population disliked acts of violence but did not object to the disenfranchisement and segregation of the Jews."). For an analysis of French popular opinion's evolution, see also *infra* notes 170-190 and accompanying text.

94. See Robert Badinter, *Peut-on être avocat lorsqu'on est juif en 1940-1944?*, in *LE DROIT ANTISÉMITES*, *supra* note 5, at 145.

95. See Michael R. Marrus, *Les juristes de Vichy dans "l'engrenage de la destruction,"* in *LE DROIT ANTISÉMITES*, *supra* note 5, at 51. As Marrus and Paxton emphasize elsewhere, Vichy's antisemitic repression was highly legalized. See ROBERT O. PAXTON & MICHAEL R. MARRUS, *VICHY FRANCE AND THE JEWS* (1981). Raul Hilberg has emphasized the centrality of the legal system to Nazi German persecution. See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 60, 359 (Revised ed. 1985) (1961). Legalization permeated Nazi repression in a variety of ways and on many levels. See e.g., Victor Klemperer's account of the degree of legalism involved in his personal experience of dispossession under Nazi rule. While his food rations were being lowered to a starvation level, pursuant to laws and decrees which also rendered him legally vulnerable to deportation to a concentration camp, and, consequently, death, Klemperer records that the Gestapo observed legal niceties when they gave him 40 Marks for his typewriter, which he was obliged to surrender as a possession forbidden to Jews. Entry of 21 November 1942, in KLEMPERER, *supra* note 91, at 278-280.

It should be noted that the legalistic prosecution of 600 Jews within the French

interpretations of anti-Jewish laws should be strict or liberal, but did not question or denounce the laws themselves.⁹⁶

Studies show that, with some notable exceptions, the judiciary for the most part tended to be lenient towards those few who went to court to claim relief from the antisemitic laws.⁹⁷ In other words, the tendency for the most part was for the courts to conclude that an individual did not fit within the statutory definition of the term "Jew." They made their rulings despite the new reversal of the burden of proof, another departure from French legal tradition, which now placed the burden on individuals to prove that they were "Aryan," and therefore *not* subject to the antisemitic laws, relieving the French State of the burden of proof.⁹⁸

Even when lenient, however, judges who applied the antisemitic laws implicitly validated them simply by virtue of applying them.⁹⁹ Those who deviated from the plain meaning of the legislative texts to allow particular individuals to escape the antisemitic laws, were following a time-honored tradition of French judges. On the one hand, French judges during Vichy, like their modern counterparts in France today, were anxious to show their adherence to a principle of French jurisprudence sacrosanct since the Revolution of 1789: that judges never create law, that they do no more than identify and then mechanically apply written, legislatively-enacted law. On the other

national court system is ironic in light of the fact that the entire Jewish population simultaneously was vulnerable to imprisonment in camps, where they retained no legal rights whatsoever. Prosecution by French judges and incarceration in regular French prisons consequently was a comparative luxury. Daladier recounts the story of the distinguished lawyer, Pierre Masse, of an old Jewish family, whose insistence on recording the official plundering of Jewish property landed him in prison, indirectly preventing his deportation. See DALADIER, *supra* note 6, at 141-42. (Writing in early 1942, Daladier did not know that Masse's imprisonment had merely delayed, but not prevented, his ultimate deportation. Masse's life ended in Auschwitz, to which he was deported from the French camp of Drancy on September 30, 1942. For an account of the deaths of Masse and both of his sons, see GEORGES WELLERS, *UN JUIF SOUS VICHY* 101 (1991, originally published in 1973 under the title *L'ÉTOILE JAUNE À L'HEURE DE VICHY*).)

96. See ARON, *supra* note 24, at 709 ("*Le Conseil d'État commenta et appliqua le statut des Juifs, comme s'il s'agissait d'une loi comparable aux autres, comme si la violation des principes de la République pouvait être acceptée par les juristes à l'instar d'une décision quelconque du pouvoir.*").

97. There were also numerous judges, however, who applied these laws with draconian inflexibility. See Isabelle Lecoq-Caron, *La Preuve de la qualité de Juif*; Emmanuelle Triol, *L'Aryanisation des biens. L'application judiciaire du statut des Juifs*, in JUGER SOUS VICHY, *supra* note 68, at, respectively, 41-59 and 61-71.

98. For an excellent discussion of the Vichy reversal in the burden of proof, see POETHICS 153-58, *supra* note 16, VICHY LAW 162-78, *supra* note 16, based on extensive analysis of French cases; Isabelle Lecoq-Caron, *La preuve de la qualité de Juif*, in JUGER SOUS VICHY, *supra* note 68, at 41-52.

99. See POETHICS 127-28, *supra* note 16; VICHY LAW, especially chapters 8-10, *supra* note 16.

hand, equally anxious to do justice in the cases before them, French judges have continually purported to apply the law when in fact silently engaging in a highly creative, and perhaps even casuistic, process that leads mysteriously from existing legislation to improbably derived (or contrived) practical resolutions. While such unavowed interpretive creativity allows French judges to make law without doing so openly, it is not a process calculated to call legislation into question. On the contrary, the methodology of French judicial decision-making and writing conspires to preclude any open questioning or challenging of legislation.¹⁰⁰ The judiciary's inferior status, unchanged by the transition from Third Republic to Vichy, made it the least likely governmental branch for effective resistance to unjust legislation, while the traditionally strongest branch of French government, the legislature, had legislated itself out of power and existence.¹⁰¹

The apparatus of French government at all levels respected and executed Vichy's measures as the law of the land. An illustrative example occurred in January of 1941, when Pétain asked Jules Jeanneney, the President of the Senate, to assemble a list of all senators who were Jewish, in order to implement against them the anti-Jewish law known as the *statut des juifs*. Jeanneney responded as follows: "I condemn the [anti-Jewish] law inasmuch as it violates justice, the respect of the human person, French tradition, and because the Germans have imposed it on you. It is, however, the law.

100. This tradition developed because the pre-Revolutionary abuses of French judges had made them a hated group. The French Revolution aimed to ensure a low status to the judiciary, viewing it as a necessary evil, not to be trusted. At least in appearance, France's post-revolutionary judiciary has been eager to refrain from creating law, or seeming to assert itself as anything more than the means of implementing law created by others. See John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996); John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959).

101. The situation was different in Germany, where the judiciary traditionally played a far more powerful role than in France. For a favorable portrayal of the powerful German judiciary's self-understanding as the guardians of the nation's conscience, see John P. Dawson, *The General Clauses, Viewed from a Distance*, 29 RABELS ZEITSCHRIFT 441 (1977). For an opposing, highly negative portrayal of the German courts as anti-democratic, see Franz L. Neumann, *The Decay of German Democracy, in THE RULE OF LAW*, *supra* note 30, at 36 (describing Germany's judges as part of the "antistate" that hastened Weimar's destruction); MÜLLER, *supra* note 33 (thorough study of German judiciary's pro-Nazism from the 1920s). Müller's study is consistent with Neumann's historical analysis of pre-1920s events in Germany: "[In 1919], the theory of the free discretion of the judge became dominant." Neumann analogizes the German judiciary after 1919 to "a kind of Upper House" of parliament. Neumann, *supra* this note, at 36. See also Kirchheimer, *Legality and Legitimacy, in THE RULE OF LAW*, *supra* note 30, at 55 ("Courts undergo a functional transformation when there is no longer a legislature distinct from the administration.").

It must be obeyed."¹⁰² And then he proceeded to comply.¹⁰³

My translation from the French fails to convey an important nuance in Jeanneney's pronouncement. He did not quite say "because the Germans have imposed it on us." That would in French have been *parce que* or *puisque les Allemands nous l'ont imposée*. His exact words were "*Je réprouve la loi . . . comme aussi les Allemands nous l'ont imposée*." Those words connote an indeterminate intersection between "*because the Germans have imposed it on us*" and "*as though the Germans had imposed it on us*," revealing a wish to interpret the *statut des juifs* as German-imposed, and simultaneously betraying an underlying understanding that it was not.

The *statut des juifs* in fact was not externally imposed on France. It was internally created, drafted, enacted and implemented. This has now been established compellingly through comprehensive documentation from the period. As one historian has put it, "[i]t was believed or pretended at the time and long after the war that, under German pressure, the Vichy government was obliged to adopt the statute of 3 October [*i.e., le statut des juifs*]. Nothing could be further from the truth."¹⁰⁴ While many excused, and still excuse, Vichy

102. JULES JEANNENEY, JOURNAL POLITIQUE, SEPTEMBRE 1939-JUILLET 1942, 282 (Jean-Noël Jeanneney ed., 1972). Significantly, Jeanneney had been a liberal politician before the war, and had opposed the armistice in 1940. See FERRO, *supra* note 45, at 61, 78, 84, 88, 91-94, 115, 122, 129-31, 134, 135, 254, 580, 642. After the war, Jeanneney became a Junior Minister in de Gaulle's government. See CHARLES DE GAULLE, MÉMOIRES DE GUERRE: LE SALUT 1944-1946 (DOCUMENTS), at 14 (1959) (hereinafter LE SALUT). For Daladier's poor opinion of Jeanneney, see DALADIER, *supra* note 6, at 106.

103. Jeanneney in fact insisted that Pétain himself assemble the list of Jewish senators, although Jeanneney complied with Pétain's request to the extent that Jeanneney sent every senator a request to report if he was Jewish, but directed them to respond to Pétain rather than to himself. See JEANNENEY, *supra* note 100, at 281-284. For the letter of one senator in protest against being asked to specify if he was Jewish, pursuant to Jeanneney's compliance in implementing the new law, see *id.*, at 284-285; also quoted in part in ROBERT BADINTER, UN ANTISÉMITISME ORDINAIRE, 110-111 (1997) ("*Il n'y a pas de 'Juifs' au Sénat. Ne font partie de cette Assemblée que des citoyens français.*"). The senator was Pierre Masse, referred to *supra* note 95. Jeanneney reports in his memoirs that Masse and three other Jewish senators asked that their written responses be deposited in the national archives. JEANNENEY, *supra* note 100, at 284. Jeanneney portrays his own response to Pétain as an act of resistance. For a less admiring analysis of Jeanneney's response to Pétain, however, see MARRUS & PAXTON, *supra* note 95, at 149. It is perhaps worth noting that Pierre Masse stated in his letter to Pétain that he overcame his own initial inclination to refuse to respond out of "deference for the government of which you are the head." ("*J'ai décidé cependant de répondre, par déférence pour le Gouvernement dont vous êtes le chef.*") See JEANNENEY, *supra* note 100, at 284. For a favorable portrayal of Jeanneney, due to his efforts to improve prison conditions for Reynaud and Mandel, see REYNAUD, *supra* note 6, at 60; more generally, portraying Jeanneney as sympathizing with resistance to Vichy, see *id.* at 94.

104. My quote is from ANDRÉ KASPI, LES JUIFS PENDANT L'OCCUPATION, 56 (1991).

France from responsibility for its own acts by reference to a German coercion that was to manifest itself only later, virtually all officials in the French legal system, like Jeanneney, obeyed the law either because it was the law, as Jeanneney declared, or because, being the law, it provided justification and therefore exculpation for those who followed and applied it gladly.¹⁰⁵

The positivism argument that the French merely obeyed the law, while meritorious to some degree, also became the scapegoat Vichy adherents blamed after the events, as they later tried to exculpate their conduct. Thus, Joseph Barthélemy, the Minister of Justice from 1941-1943, wrote the following positivistic self-justification from his prison cell after the war:

There always remains the nation to save and to serve. The only stable, reasonable, solid policy is the policy of rescue (*"la politique de sauvetage"*). The duty of all French people is to cling to him who holds the flag and to ease his task by their adherence to him. May God save France!¹⁰⁶

Nazi Germany offers a sharp contrast to Vichy France. Hatred was an acceptable and much-proclaimed sentiment in the German official discourse and legal scholarship of the time. The theme of hating Jews as a characterizing element of the German body politic was particularly well adapted to the legal philosophy of Carl Schmitt, Nazi Germany's foremost legal theorist. In *The Concept of the Political*, Schmitt suggests that hatred and murder of the inimical, the other, are healthy for the body politic,¹⁰⁷ and that the enemy should

In the pages following the quote, Kaspi develops in painstaking detail the wholly French initiative behind the *statut des juifs*. Marrus and Paxton similarly demonstrate conclusively, and with ample documentation, that none of the anti-Jewish measures of 1940 were imposed by the Germans. See MARRUS & PAXTON, *supra* note 95, at 5 ("Years of scrutiny of the records left by German services in Paris have turned up no trace of German orders to Vichy in 1940... to adopt antisemitic legislation."). France's autonomous initiation of antisemitic legislation stands in stark contrast to the example of Czechoslovakia, which had not offered military resistance to Hitler, yet whose leaders "were so reluctant to create anti-Jewish restrictions that the Nazis gave up on trying to promulgate anti-Jewish laws through the facade of Czech government and issued almost all antisemitic decrees themselves." HELEN EPSTEIN, *WHERE SHE CAME FROM*, 199 (1997).

105. On the grave dilemma of deciding whether to break the law, see LUCIEN LAZARE, *LE LIVRE DES JUSTES: HISTOIRE DU SAUVETAGE DES JUIFS PAR DES NON JUIFS EN FRANCE, 1940-1944*, 82-103 (1993); LUCIE AUBRAC, *OUTWITTING THE GESTAPO* (Konrad Bieher trans., Univ. of Nebr. Press 1993) (1984). For an illustration of Nazi Germany's obsession with enacting laws to legalize and legitimize its conduct, see RICHARD LAWRENCE MILLER, *NAZI JUSTIZ: LAW OF THE HOLOCAUST* (1995).

106. BARTHÉLEMY, *supra* note 14, at 549.

107. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL*, 33 (George Schwab trans. 1996) (defining the enemy in terms of "the real possibility of physical killing"). For a penetrating analysis of this area of Schmitt's thought, see Leo Strauss, *Notes on Carl*

be considered "an outlaw of humanity."¹⁰⁸

The post-war German legal community blamed positivism's ascendance in German judicial methodology for the compliance of German judges with Nazi law.¹⁰⁹ Significantly, however, both German and French criminal law continued to forbid premeditated murder. Thus, both judiciaries regularly ignored positive legislation. Article 139 of the German Criminal Code in particular also criminalized the omission to inform authorities or the projected victim of crimes against life.¹¹⁰ In his sermon of 3 August 1941, Bishop Galen of Münster, quoted both of the above code articles. He

Schmitt, The Concept of the Political, in HEINRICH MEIER, CARL SCHMITT & LEO STRAUSS: THE HIDDEN DIALOGUE 91-97 (J. Harvey Lomax trans., 1995).

108. *Id.* at 79. On the issue of hatred in German public discourse, see, e.g., KLEMPERER, *supra* note 91, especially entry of 27 February 1943 (describing the expressions of hatred in recent public speeches by Hitler and Goebbels). For a trenchant analysis of how the Nazi régime rendered extermination palatable to the SS, see SAUL FRIEDLÄNDER, REFLECTIONS OF NAZISM: AN ESSAY ON KITSCH AND DEATH, 104 (trans. Thomas Weyr, 1993) (analysis of Himmler's rhetorical technique in October 4, 1943 speech: "Insert extermination into the fabric of required behavior that is universally accepted, to evacuate its load of horror").

109. See MÜLLER, *supra* note 33. Müller suggests that Germany's post-war judges who had been judges throughout the Nazi period tried to exculpate themselves and their virulently pro-Nazi decisions by pretending to have been legal positivists who had felt obliged to apply the law, no matter what the law was. Müller also maintains and documents persuasively that the German judiciary had been pro-Nazi long before 1933, continued to be so after 1945, and that its post-war rejection of positivism and sudden espousal of naturalism were designed to provide a theoretical basis for rejecting the future reforms the new, democratic West German government was likely to propose. See *id.* at 223. For an excellent article consistent with Müller's conclusions, and detailing the German judiciary's theoretical rejection of positivism, see Walter Ott and Franziska Buob, *Did Legal Positivism Render German Jurists Defenceless during the Third Reich?*, in 2 SOCIAL & LEGAL STUDIES 91 (1993). For an overview of post-war German legal scholars' and judges' rejection of positivism and renewed interest in natural law, see Edgar Bodenheimer, *Significant Developments in German Legal Philosophy Since 1945*, 3 AM. J. COMP. L. 379 (1954). For the argument that the German judiciary was less well able to resist fascism than its Italian counterpart, due to Germany's tradition of applying the *Generalklauseln*, and Italy's contrary tradition, see JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 53-54 (1985).

110. See Articles 211 and 139 of the German Criminal Code, reprinted in *Documents*, 160 REVUE D'HISTOIRE DE LA SHOAH 64 (1997) (Article 139: "He who learns in a credible manner that a crime is being plotted against a life, and who fails to warn in timely fashion the authorities or the person threatened, will be punished.") But see B. Mendelsohn, *Les infractions commises sous le régime nazi sont-elles des "crimes" au sens du droit commun?*, 43 REVUE DE DROIT INTERNATIONAL DE SCIENCES DIPLOMATIQUES ET POLITIQUES 333 (1966) (arguing that the post-war concept of crimes against humanity supplemented the national law's failure to criminalize acts committed during the war against civilian populations, such as deportation and human servitude, with the exceptions of murder and assassination); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L., 289, 358 (agreeing with Mendelsohn).

announced in his sermon that he had informed the authorities of victims targeted for death under the Nazi euthanasia program. He read the following excerpt from the letter he had written the authorities:

According to news which has reached me, a large number of sick people from the provincial sanatorium of Münster are to be transported this week . . . to the sanatorium of Eichberg, as so-called "unproductive citizens," and to be put to death there with premeditation, as has been the practice—according to a conviction shared by everyone—after analogous transports from other sanatoria. Such a procedure not only is contrary to divine and natural law, but it also constitutes murder pursuant to Article 211 of the Criminal Code, murder punishable by death. It is thus my duty to initiate a complaint, pursuant to Article 139 of the Criminal Code, and to demand that the threatened citizens be protected without delay by action to stop the projected transport and by an occupation of the places designated for the murders. I request that you inform me of the result of your intervention.

The Bishop then informed his congregation of the authorities' failure to comply with the law:

I did not learn of any intervention by the Public Prosecutor or by the police. Already on 26 July I had protested vociferously by letter to the administration of the Province of Westphalia to which the sanatoria belong. It was of no use. The first transport of innocent people condemned to death left Marienthal, and I now learn that eight hundred sick people were transferred to the Warstein sanatorium. We must assume that these poor, defenseless sick people were rapidly put to death.¹¹¹

Thus, the positivist tradition, if such it was, clearly was practiced selectively. Depending upon one's interpretation of what the relevant law was, and which laws were the relevant ones, a positivist approach equally might have attenuated the injustices of the era in both Germany and France. Had German and French judges chosen to apply provisions such as Articles 211 and 139, the results would have been far different, and arguably equally positivistic in nature.

Although there were notable exceptions, the French and German judiciaries generally ruled in a manner consistent with their respective nation's judicial styles. The German judiciary used a methodology for case-law adjudication based on general principles of law, or "*Generalklauseln*." The French judiciary continued its time-honored, post-1789 tradition of avoiding its version of *Generalklauseln*, the French "*principes généraux*."¹¹² Paradoxically,

111. Text of Bishop Galen's sermon, reprinted in REVUE D'HISTOIRE DE LA SHOAH, *supra* note 110, at 64-65.

112. See *supra* notes 72-76 and accompanying text for a discussion of *principes généraux* under French law.

post-war critics have ascribed both judicial systems' appalling failure of justice during their Nazi years, respectively, to the use of these "general principles" in Germany's case, and in France's, to their non-use.¹¹³

Weisberg's analysis of Vichy law and rhetoric, both strikingly original and profound, emphasizes the importance of the societal context. He concludes that "the treatment of Jews by the Vichy legal establishment cannot be fully explained by the existence alone of specific laws."¹¹⁴ I particularly agree with Weisberg in his reference to Stanley Fish's theory: "Fish... has posited... that it is the community that creates... the meanings that it brings to its practice and to that practice's central texts... so any explanation of institutional behaviour that would hold people defined or constrained by a text (here, Vichy statutes) would be suspect."¹¹⁵

I differ with Weisberg, however, in that he focuses the role of positivism within a framework of French interpretive tradition. He blames what he calls "Vichy hermeneutics" for enabling Vichy's exclusionary, racist measures. He states his thesis as follows: "The proposal of these pages, in its ultimate articulation, is that *a form of French Catholic reasoning greatly influenced the ability of Vichy racial laws to infiltrate a culture otherwise antipathetic to them.*"¹¹⁶ He does not discuss the interpretive methodology as a failure to implement the *principes généraux*, but, rather, as a hermeneutics analogous to "post-modern strategies of reading," which he describes as "ironically close to a form of French Catholic reading of dominant texts," and

113. With respect to Germany, see Neumann, *supra* note 31. For a warning in 1933, just after Hitler came to power, against the widespread judicial use of Generalklauseln, see JUSTUS WILHELM HEDEMANN, DIE FLUCHT IN DIE GENERALKLAUSELN: EINE GEFAHR FÜR RECHT UND STAAT, 3 (1933) ("[D]iese Frage [der Generalklausel] ist... wahrscheinlich die wichtigste Frage, die es überhaupt für den Juristen des 20. Jahrhunderts gibt."). But see MÜLLER, *supra* note 33; RÜTHERS, *supra* note 33, at 98. For a well-balanced approach, emphasizing the degree to which law production in Nazi Germany was both deformalized and deprofessionalized, see Volkmar Gessner & Konstanze Plett, *Informal Justice in German Legal Development*, in BEYOND DISPUTING: EXPLORING LEGAL CULTURE IN FIVE EUROPEAN COUNTRIES, 145-168 (Konstanze Plett & Catherine S. Menschievitz, eds., 1991). With respect to France, see VICHY LAW, *supra* note 16, at 389. (Weisberg faults the French legal community for a narrow reading of texts, a "low-level technical precision that inhibited them from making liberal legal arguments.") (emphasis omitted).

114. *Id.* at 387.

115. *Id.* at 392 n.9, quoting STANLEY FISH, IS THERE A TEXT IN THIS CLASS (1980). Cf. Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 839 (1997) ("the meaning and impact of procedural regulation turn on external conditions—most directly on the institutional context in which justice is administered in a particular country").

116. VICHY LAW, *supra* note 16, at 389 (emphasis added).

emphasizes "the religious sources of Vichy legal hermeneutics."¹¹⁷

My divergence from Weisberg's thesis concerns the emphasis he places on interpretive methodology. Unlike Weisberg, I believe that the culture in which Vichy laws were enacted, interpreted and implemented was not "otherwise antipathetic to them,"¹¹⁸ as he puts it, but, on the contrary, deeply receptive to them. Interpretive methodologies were not, in my view, an autonomous substantive factor of significance in France, where the courts' narrow readings independently constituted what I would call a rejection of the available *principes généraux*, and what Weisberg calls an implementation of "rigorous, low-level technical" readings.¹¹⁹ Interpretive methodologies instead served the interpreters' socio-political outlooks. This was the primary operating force in both France and Germany, and explains why the two countries' judiciaries could and did produce similarly outrageous decisions despite their divergent, even contradictory, interpretive methodologies.

Fuller and Hart debated positivism's responsibility for legalized evil in 1958.¹²⁰ In more recent articles, both Frederick Schauer and Mark Osiel argue that it is erroneous to ascribe a relationship between any particular legal theory or philosophy of law and practical outcomes.¹²¹ Judicial methodology is subject to an equally low

117. *Id.*

118. *Id.*

119. *Id.*

120. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). For a more theoretical critique of positivism, see LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940). For an excellent inquiry into the role of positivism in the German-occupied British Channel Islands, see David Fraser, "Quite contrary to the principles of British justice": *The Jews of the Channel Islands and the Rule of Law, 1940-1945* (manuscript on file with author).

121. See Osiel, *supra* note 33. See also Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 827 (1993) ("The alleged evils of formalism, positivism, and a host of other widely castigated -isms are evils, if evils they be, not acontextually, but because of relatively time-specific, place-specific, and role-specific patterns of social and political behavior imposed on the moral landscape."). Accord, Ott & Buob, *supra* note 109. As Balkin notes, legal theory itself is subject to "ideological drift." See *Ideological Drift*, *supra* note 67. See also BERNARD S. JACKSON, *SEMIOTICS AND LEGAL THEORY*, especially *Preliminary Conclusions for Legal Theory*, 123-43 (1977); Dewey, *supra* note 36, at 26 ("Failure to recognize that general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations, explains the otherwise paradoxical fact that the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era."). A similar contemporary debate over the role of judicial methodology concerns Justice Scalia's advocacy of textualism. In his review of ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1998), Professor Robert Post concludes that Scalia's theory is "not convincing when it suggests that the great political issues of constitutional adjudication would somehow be eased if only we could understand and apply the right principles of

correlation with practical outcomes in individual cases. To believe in a high correlation between the philosophical or methodological theory a judge applies and the specific outcome of cases is to overlook the indeterminacy embedded in the judicial decision-making process.¹²²

A recent trend in scholarship concerning Nazi Germany and Vichy France goes further in an anti-positivist direction than I consider justified, however. This trend has been to suggest that the populations' and judiciaries' conduct reflected unalloyed support for both regimes' discriminatory and even murderous behavior. When closely examined, this position too easily discounts fear as a legitimate motivating force for compliance with Nazi or Vichy law.¹²³ The danger of the new scholarly trend is to use recently discovered facts in order to discredit a motivation that was reasonable and legitimate within the contexts of former times, among people who were not privy to recent historical discoveries. In my view, fear was a logical and reasonable motivator for political compliance in Vichy France and Nazi Germany.

Recent scholarship has revealed evidence that those who refused to comply with discriminatory or persecutionist strictures in both Vichy France and Nazi Germany had less to fear than previously had been assumed. Sometimes dissidents suffered light penalties, and

interpretation." Robert Post, *Justice for Scalia*, *The New York Review of Books*, 57, 62 (June 11, 1998). Post insightfully emphasizes that "there is no escaping the hard responsibility for judgment that . . . adjudication imposes upon . . . judges." *Id.* In the context of comparative legal theory, Bernhard Großfeld has reached a similar conclusion: "I cannot bring myself to believe that any theory is a panacea . . . method affords no security . . . is no substitute for thought." BERNHARD GROßFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW*, 170 (Tony Weir trans., 1990).

122. This element of indeterminacy, which has been a focal point of concern in justifications for legal systems, was advocated by Carl Schmitt, the preeminent Nazi legal philosopher, as a way of ensuring the Führer's unlimited power. See CARL SCHMITT, *ÜBER DIE DREI ARTEN DES RECHTSWISSENSCHAFTLICHEN DENKENS*. In this context, William Scheuerman also refers to Schmitt's *Nationalsozialismus und Rechtsstaat*, 12-13 *JURISTISCHE WOCHENSCHRIFTE* 63 (1934) and *Nationalsozialistisches Rechtsdenken*, 10 *DEUTSCHES RECHT* 4 (1934). See *THE RULE OF LAW*, *supra* note 30, at 21. Schmitt's solution to the chaotic aspect inherent in such judicial decision-making was to require an ethnically homogeneous judiciary. He believed that this would exclude viewpoints foreign to the nation or *Volk*, and result in harmonious case law. He also believed that democracy depended on the homogeneity of the *Volk*. See CARL SCHMITT, *LEGALITÄT UND LEGITIMITÄT*, 43, 90 (1932). Linder aptly observes that "the Nazi flight into the general clauses merely shifted the question from the judicial interpretation of allegedly unambiguous statutes to that of the general clauses themselves." Linder, *supra* note 33, at 3.

123. See DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996); STOLTZFUS, *supra* note 5; JAMES M. GLASS, "LIFE UNWORTHY OF LIFE": RACIAL PHOBIA AND MASS MURDER IN HITLER'S GERMANY (1997); VICHY LAW, *supra* note 16; MÜLLER, *supra* note 33.

sometimes none at all. The fact that this was so does not mean that it was understood at the time, however. Daniel Goldhagen cites examples of soldiers who refused to participate in gruesome murders of Jewish civilians, and who suffered few or no penalties.¹²⁴ In a fascinating book about a previously little-known event, Nathan Stoltzfus has documented the success of a group of unarmed "Aryan" women who saved their Jewish husbands from deportation and death by demonstrating openly and loudly in front of their husbands' prison in Nazi Germany in February of 1943.¹²⁵ Stoltzfus compellingly demonstrates that Hitler was anxious to maintain public approval, and that he was prepared to make significant concessions if he deemed them necessary to maintain public support.¹²⁶ Stoltzfus also documents popular success in reversing a Nazi government decision to remove crucifixes from the schools of Germany.¹²⁷ In addition, the public outcry against the euthanasia program, widespread and supported by church leadership, like that of Bishop Galen,¹²⁸ successfully resulted in Hitler's decision to halt the entire euthanasia program.

By the same token, with respect to the German judiciary, Ingo Müller has documented both the scarcity of judicial opposition to Nazi imperatives, and the painlessness of such protest as existed.¹²⁹ A German judge who was unwilling to apply Nazi rules, and who protested openly, not only was able to retire in peace, but also with his pension intact.¹³⁰ With respect to Vichy France, Richard Weisberg has noted that Jacques Charpentier and other members of the Paris Bar took courageous stands against Vichy orders when they felt that the independence of their profession was at stake, and that they suffered little in the way of reprisals.¹³¹ Finally, Danièle Lochak refers to scholars who courageously opposed Vichy laws concerning

124. GOLDHAGEN, *supra* note 123, at 213-38.

125. See STOLTZFUS, *supra* note 5, at 209-57.

126. See STOLTZFUS, *supra* note 5.

127. See *id.* at 145-47.

128. See *supra* notes 109-111, and accompanying text.

129. See MÜLLER, *supra* note 33, at 192-97. Müller notes that two German judges were executed, but this was for participating in the July, 1944 plot against Hitler's life, not because of their professional conduct, *id.* at 192-93, and that "if a judge refused to accept the injustices of the system, the worst he had to fear was early retirement." *Id.* at 195. Accord, Linder, *supra* note 33, at 27 ("[W]hat is significant here is that despite the strong rebuke [for a decision favoring Jews], the judge was not [even] forced to retire; instead, he was transferred to a civil division. His scheduled promotion to director of an appellate division did not materialize and he was expelled from the Nazi party."). For similar conclusions with respect to unpunished, but nevertheless rare, dissent in the Nazi-occupied Channel Islands, see Fraser, *supra* note 120, at 21-24.

130. See MÜLLER, *supra* note 33.

131. See VICHY LAW, *supra* note 16, at 47-58.

illegitimate children, but who remained silent concerning the antisemitic laws.¹³²

Further arguments to debunk fear as a reasonable and legitimate motivating force dwell on Pétain's sense of dependence on public approval. Robert Paxton quotes Pétain as saying that he needed "continuous circuits between the authority of the state and the confidence of the people."¹³³ Serge Klarsfeld presents compelling evidence that Pétain and Laval's eventual, reluctant refusal to comply with German demands for Jewish deportations masked the Vichy government's underlying enthusiasm for the German policy of Jewish deportations, and that Vichy's refusal to comply was a concession from a government fearful of growing popular disapproval towards France's active participation in the persecution of Jews.¹³⁴

The recent anti-positivist scholarship provides valuable evidence that protest may have been possible and successful to a far larger extent than previously was realized. It also further undermines the credibility of collaborators who claimed after the war that protest had not been possible, and that they would have been killed had they not complied with official persecution policies.¹³⁵ The danger of the new

132. See Lochak, *supra* note 79, at 542. This evidence militates against Lochak's prior argument that the culprit was positivism.

133. See PAXTON, *supra* note 6, at 192. Moreover, in the French Supreme Court's 1997 decision that Maurice Papon could stand trial, the Court explicitly stated that no threat of reprisals ever was carried out against a French civil servant. See Cass. Crim., Jan. 23, 1997; Papon [arrêt no. 502], 14 LA SEMAINE JURIDIQUE 22812 (1997) ("*aucune menace de représailles contre les fonctionnaires français n'a . . . jamais été exécutée.*").

134. See SERGE KLARSFELD, VICHY-AUSCHWITZ, LE RÔLE DE VICHY DANS LA SOLUTION FINALE DE LA QUESTION JUIVE EN FRANCE. 1943-1944 (1985) (discussing Pétain's reluctance to assist the Germans once French popular opinion had turned against such aid, despite his own desire to collaborate as actively as ever). Klarsfeld also documents Vichy's anger that the Italians occupying Nice were helping Jews escape the Vichy-Nazi dragnet, and French government protests against Italian control over Jewish policy, because the Italians were protecting Jews. Klarsfeld notes that "[t]his protest of Vichy in the name of French sovereignty and relying on the Hague Convention with respect to the Italians, who tried to save Jews regardless of their nationality, is in contrast to the absence of any protest by Vichy with respect to the Germans regarding the fate of deported Jews, among whom were many French nationals." *Id.* at 53. Klarsfeld also provides meticulous documentation of Vichy's anger that the Germans were not better able to force the Italians to comply with the Nazi deportation policy. Vichy was particularly distressed because its own eager collaboration could less easily be passed off as forced compliance as long as Italy was successful in eluding German deportation demands. See *id.* at 26-28. See also PAXTON, *supra* note 6, at 183 ("In June 1943 Italian police prefect Lospinosa blocked the French arrest of 7,000 foreign Jews at Mégève. That a fascist Italian police prefect should have to point out to Antiganac, Darquier de Pellepoix's hatchet man in the [Vichy] Commissariat-General of Jewish Affairs, that Italy 'respected the elementary principles of humanity' is some measure of judgment upon Vichy antisemitism.").

135. Stoltzfus has stated that one of the goals of his new book, see *supra* note 5, is to

scholarly trend, however, is the risk of confusing currently recognized facts with contrary contemporaneous perceptions. While it may be true that in fact people had less to fear than previously was understood, it is not logically permissible to infer additionally that citizens and judges did not sincerely, genuinely and reasonably (even if incorrectly) fear that their lives depended on compliance with the law. Thus, fear of reprisals may have been unnecessary, but nevertheless a genuine and reasonable force in inhibiting political dissent.

I also believe that some of the recent scholarly trend has exaggerated the extent to which fear was misguided, and the extent to which the Nazi and Vichy governments were prepared to tolerate and accommodate political dissent. French judges had before their eyes the example of the Belgian judiciary as a frightening augur of what might happen to themselves if they chose to protest. The Nazis did not hesitate to deport and murder Belgian judges, policemen, lawyers and supporting court personnel who refused to comply with German orders. With characteristic brutality, the Nazis swiftly responded to a strike by the judges of Antwerp with arrests, murders and hostage-takings.¹³⁶

The treatment of dissenters was not entirely uniform, but torture and summary executions were frequent in both Germany and France, as well as in other German-occupied territories. Concentration camps abounded, overflowing with political prisoners arrested by the secret state police. Reprisals were publicized intentionally to discourage dissent. French non-Jews who protested the requirement that Jews wear a yellow star were interned in French concentration camps, although they were not deported.¹³⁷ Resistance members were summarily executed and brutally tortured in France and elsewhere. The Vichy government officially instituted the *milice*, a paramilitary organization known for its Gestapo-like brutality, to combat opponents of the Vichy régime, and to support the Nazi

undermine the credibility of "the early [post-war] paradigm about resistance which held that ordinary Germans could do nothing about Hitler once he held power." Transcription from author's notes of talk by Nathan Stoltzfus at University of Pittsburgh, October 21, 1997.

136. For a discussion of Belgian political dissent, its qualified results, and the vigor and brutality of Nazi reprisals, see Didier Boden, *le Droit belge sous L'Occupation*, in *LE DROIT ANTISÉMITES*, *supra* note 5, at 543-58. Daladier tersely notes in his journal entry for October 18, 1941 that France's "judges would appear to be on the verge of resigning. The government has let them know that if they do, they'll be sent to prison." DALADIER, *supra* note 6, at 90. See also REYNAUD, *supra* note 6, at 258 (describing a "campaign of fear" in his journal entry of February 24, 1943).

137. See WELLERS, *supra* note 95, at 114.

occupier.¹³⁸ In a retaliatory measure, the Nazis massacred the French town of Oradour, including the women and children. In Germany, protest at the pulpit led Pastor Martin Niemöller to be incarcerated for close to a decade in a prison and concentration camp; and Dietrich Bonhoeffer, minister of the Confessional Church, to be imprisoned and finally murdered in Dachau.¹³⁹ The slow torture to death of the July, 1944 conspirators against Hitler's life is well known.¹⁴⁰ Throughout occupied Europe, the price for harboring Jews was deportation to the same concentration camps to which the Jews were sent.

Fear was thus a logical and potent force. If seen as part of positivism's sway, fear was an enabling influence in the implementation of Nazi and Vichy injustice. Its repressive influence, however, operated primarily on those who contemplated political dissent.¹⁴¹ Thus, while it is erroneous to discount the powerful effect of fear on the conduct of the citizens of Vichy France and Nazi Germany, it is equally erroneous to ascribe the demise of democracy to positivism, particularly because such a position overlooks the extent to which the new régimes' laws were planted in receptive soil. With respect to the judiciaries in particular, to blame positivism for the injustice of judicial decisions is also to ignore the capacity for choice and the flexibility that reside in the judicial decision-making process.¹⁴² As with so many competing claims to truth, both the

138. For photocopies of German printed announcements in France of mass reprisals, and warnings of more merciless future reprisals, see RAYMOND AUBRAC, *THE FRENCH RESISTANCE 1940-1944*, 130-131 (Louise Guiney trans., 1997). The *milice* was a throw-back to the pre-Revolutionary era. For a discussion of the original French *milice*, see DE TOCQUEVILLE, *supra* note 1, at 104.

139. See, e.g., SABINE LEIBHOLZ-BONHOEFFER, *THE BONHOEFFERS: PORTRAIT OF A FAMILY* (1971); LOVE LETTERS FROM CELL 92: THE CORRESPONDENCE BETWEEN DIETRICH BONHOEFFER AND MARIA VON WEDEMAYER 1943-1945 (Ruth-Alice von Bismarck & Ulrich Kabitz eds., John Brownjohn trans., 1994); MARIE VASSILTCHIKOV, *BERLIN DIARIES, 1940-1945* (1987). For the dates of Niemöller's incarcerations, see ALISON OWINGS, *FRAUEN* 304 (1995).

140. See, e.g., JOHN TOLAND, *II ADOLF HITLER* 927 (1976).

141. Hannah Arendt defined totalitarianism as a régime of total arbitrary terror, in the sense that each and every inhabitant of the state lives in constant terror of the knock on the door that signifies arbitrary arrest. According to Arendt, only Stalinist Russia ever reached the fulfillment of complete arbitrariness of punishment necessary to qualify as a totalitarian state, although Hitler's Germany was progressing towards that point by 1945. See ARENDT, *supra* note 21.

142. But see Lochak, *Le juge doit-il appliquer une loi inique?*, in JUGER SOUS VICHY, *supra* note 68, at 29-39, for a persuasive (and positivistic) account of the limits to judicial freedom. Lochak recounts the story of Alessandro Galante Garrone, an Italian judge who decided to try to subvert Mussolini's rule by remaining on the bench, but who eventually left the bench to go underground, having concluded that he could not do justice by working within the system, that, in effect, he was unable to subvert the system from within.

positivists and the anti-positivists have captured pieces of the picture. It is in combining the pieces that one begins to see them as indissociably interactive, each less significant on its own than its proponents suggest, and each dependent on a confluence of other reciprocally generative factors.

V. The Multiplicity and Polysemicity of "True" Frances

Law thus had a dual role: it was a factor in preparing a smooth transition from constitutional democracy to fascism, but also in disguising that transition under a façade of continuity. Defining Vichy as a radical break from the Third Republic, as a discontinuity not meriting the name "France" wedged between two republics, promotes the perception of a true France that is a republic, interrupted by an alien and illegal Vichy, and restored with the end of the war.

While I do not share this view, I do not mean to disparage it. It was not just the view of a post-war, self-serving French officialdom and citizenry that hoped to avoid confronting France's ugly contributions to the holocaust. It was also my grandfather's vision of France, long before the end of the war. He wrote to my mother and the rest of his family of "*la vraie France*," the true France, in whose return he fervently believed, to which he had shifted the deep allegiance he formerly had felt for his native Germany, and the very idea of which made him reluctant to consider emigration.¹⁴³ He preferred to wait for the aberrant France to cast off her shell, to recover her former, civilized identity, the one he considered to be fundamental, latent and ultimately ineradicable.

References to "*la vraie France*" abounded during the Vichy period. The import of this term fluctuated according to the particular sets of concepts and categories dominant in the particular community employing it. Used in my grandfather's sense, references to "*la vraie France*" were typical in French Jewish, refugee and Resistance circles. For example, Georges Wellers, the distinguished scientist,

I include this reference because it illustrates the limits to judicial flexibility. My point, rather, is that judicial interpretive freedom also must be taken into account, and that it attenuates positivism's role, without, however, eliminating it.

143. For a more developed portrayal of my grandfather's attitude towards emigration, including his comment in the fall of 1941 that he wished the boat taking him away from France were sailing in the opposite direction, see RONALD, *supra* note 8. For an analysis of the "deep, existential crisis" emigration provoked in assimilated German Jews, see W. MICHAEL BLUMENTHAL, *THE INVISIBLE WALL: GERMANS AND JEWS* 376 (1998), a monumentally scholarly work, despite disclaimers to the contrary by its author, the former U.S. Secretary of the Treasury. More generally, for a most insightful depiction and analysis of assimilated German Jews that goes far beyond the autobiographical, see PETER GAY, *MY GERMAN QUESTION: GROWING UP IN NAZI BERLIN* (1998).

concentration camp survivor and later holocaust historian, in recollections of his imprisonment in Drancy, a notorious French camp and eventual way-station to Auschwitz, recounts how René Blum, the brother of France's Jewish prime minister Léon Blum, tried to comfort children in Drancy before deportation to Auschwitz.

According to Wellers, Blum was crestfallen when a sick, solitary and bitter little girl refused to countenance his explanation that the French who had rounded her up, taken her family from her and who guarded her now were not the "true" French, and that, similarly, the only France she had ever known was not *la vraie France*, the true France.¹⁴⁴ In a role reversal, it was the adult who sought to persuade a child too cynical to have retained her ability to suspend disbelief, that the apparent, lived experience was the mirage, and that the viable reality was an abstract, unobservable construct of an invisible true France, somnolescent beneath its Vichy personificator.

References to a "true France" were also pervasive among Vichy enthusiasts and officials. They promised, proclaimed and celebrated a resurrection of *la vraie France*, starting with the elimination from public life and power of those who were not "truly French," those who allegedly had sullied and degraded France politically, socially and culturally, betraying and reducing it to the state of weakness that had caused it to lose the war. In the discourse of the *maréchalistes*,¹⁴⁵ the "true France" was not the France of business and industry, but was the nation rooted in soil. It was not the France of egotistical individualism, which touted individual rights as ultimate values, but

144. See WELLERS, *supra* note 95, at 118-122. Despite René Blum's arguable naïveté in the anecdote recounted above, Wellers' portrait of him ranks among the most moving in holocaust literature. Blum emerges as a man characterized by a mixture of heroism, selflessness, idealism and profound integrity, strikingly reminiscent of countless descriptions of his more famous brother which one finds in many pre-war and wartime recollections of contemporaries. René Blum's story ended more tragically than his brother's, however, as he perished in Auschwitz. (Léon Blum managed to survive, although imprisoned in Buchenwald, because, along with Daladier, Reynaud, Gamelin, Weygand and other Third Republic dignitaries eventually deported to Germany, the former prime minister was considered by the Germans to be a potential hostage.) For Léon Blum's vision of "the true France," see TONY JUDT, *THE BURDEN OF RESPONSIBILITY: BLUM, CAMUS, ARON AND THE FRENCH TWENTIETH CENTURY* 44, 82 (1998). For Third Republic prime minister Paul Reynaud's description of Vichy and the armistice as contrary to the true France, see REYNAUD, *supra* note 5, at 92-93 ("Il était écrit en lettres de feu dans l'armistice que nous monterions à genoux l'escalier de la servitude, que nous finirions par être en guerre avec l'Angleterre, par nous brouiller avec l'Amérique et finalement par être en guerre avec elle aussi. Heureusement, l'armistice, c'est Vichy, et Vichy, ce n'est pas la France.") Writing to his aged mother in December, 1941, Reynaud assured her that, if France ever became France again, he would forgive the nation for his mistreatment: "si la France redevient un jour la France, pour ce qui est de moi, tout sera oublié." *Id.* at 154.

145. *I.e.*, supporters of Marshal Pétain's Vichy régime.

the France that placed community over individual, and hard work over profiteering.¹⁴⁶ This France could flourish only if purified of alien, foreign elements, such as the foreigners and Jews who had been flooding the country for years.¹⁴⁷

After the war, de Gaulle would revive, reanimate and reconstruct the concept of a single, true and eternal France ("*la seule France, . . . la vraie France, . . . la France éternelle*") as he sought to wipe Vichy from the slate. Implicit in the concept of a single, true France was not just a legitimate government versus an illegitimate one, but also the myth of a unified, harmonious people.¹⁴⁸ This latter theme de Gaulle evoked more explicitly in a speech he gave in Vichy, fifteen years after the fall of Pétain's régime: "We are one people . . . we are the people of France, the one and only French people."¹⁴⁹ De Gaulle's vision remains intact today in many official circles.¹⁵⁰ As recently as September, 1997, the *Figaro* literary supplement's front-page editorial, in an issue devoted to Vichy, defined Vichy as not being French: "France, vanquished, occupied by a foreign power, shocked, helpless, blinded, *no longer was herself*."¹⁵¹

During the recent trial of Vichy police official Maurice Papon, a lawyer who represented two French Jewish institutions also referred to a true France that implicitly excluded Vichy. Addressing the jury, he defended the trial against criticism that it was nothing but a case of

146. The Vichy concept of *corporatisme* harked back to pre-Revolutionary times. For a discussion of the feudal nature of pre-Revolutionary communal rights in France, see MARKOFF, *supra* note 15, at 171-175; BLOCH, *supra* note 15.

147. The *épuration* or "cleansing" of Jews from professional life also had precedents in pre-war France. For a history of the repeated politically motivated *épurations* of French teachers from France's schools, see SINGER, *supra* note 21, at 49-51; and *id.*, at 354 n.39, citing Paul Gerbod, *Les épurations dans l'enseignement public de la Restauration à la Quatrième République: 1815-1946*, in LES ÉPURATIONS ADMINISTRATIVES XIXE - XXE SIÈCLES, 81-98 (1977).

148. Cf. "France . . . one and indivisible" ("*la France . . . une et indivisible*") in de Gaulle's speech at Chaillot Palace on September 12, 1944, reprinted in his memoirs, LE SALUT, *supra* note 102, at 20. See also de Gaulle's radio address of October 14, 1944, in *id.* at 116-17 ("*Agriculteurs, ouvriers, artisans, patrons, fonctionnaires, n'ont jamais, depuis que la France est la France, été plus étroitement solidaires qu'ils ne le sont . . . la France . . . sous peine de périr . . . a besoin de leur union*"); and his September, 1944 speech in Nancy: "France, bruised, scoffed-at France, oppressed France, finally rose again, entirely unified in a single will and a single hope." ("*La France, la France meurtrie, bafouée, la France opprimée, s'est redressée enfin tout entière rassemblée dans une seule volonté et dans une seule espérance.*"). CHARLES DE GAULLE, LETTRES, NOTES ET CARNETS, 319 (1983).

149. *Le Monde*, 19 and 20 April, 1959, quoted in ROUSSO, *supra* note 67, at 73.

150. See, e.g., VALÉRY GISCARD-D'ESTAING, DÉMOCRATIE FRANÇAISE, 65 (1976) ("*Une société unie est l'aboutissement nécessaire . . . Notre société ne sera complètement réconciliée avec elle-même que lorsque les anciennes divisions auront été effacées.*")

151. Jean-Marie Rouart, Editorial, in *le Figaro littéraire*, 18 September 1997, No. 16514, at 1 (emphasis added) ("*la France vaincue, occupée par une puissance étrangère, choquée, désemparée, aveuglée, n'était plus elle-même*").

Jews seeking revenge: "It is the Attorney General who, in the name of the French State, *the real one*, will ask for Maurice Papon to be punished."¹⁵² The lawyer, Maître Jakubowicz, railed against former Resistance members who had testified on behalf of Papon: "we don't want *your truth*" ("*votre vérité on n'en veut pas*").¹⁵³

The differences coexisting in the many Frances within the nation have been the more wrenching because dominant Frances have denied the existence and values of others. Those who are reluctant to classify Vichy as the government of France from 1940 to 1944 do not want to honor it with the denomination of legal government. They may also prefer that Vichy carry the opprobrium of illegality because its illegality would shield France as a state and as a people from connection to Vichy's acts. The arguments for illegality noted above, even if correct, hold little suasion, however, because they are highly technical in nature, and because similar technical arguments might be made to dispute the legality of de Gaulle's presidency.¹⁵⁴ In this context, Joseph Weiler's distinction between social and political legitimacy is most helpful: "To suggest that the legitimacy of the polity, or some of its features, may be called into question is not to say that the polity is about to become illegitimate, either in the strict legal sense or in the court of public opinion."¹⁵⁵

152. "*C'est Monsieur le Procureur général qui, au nom de l'État français, le vrai, requerra une peine à l'encontre de Maurice Papon.*" Me. Alain Jakubowicz's argument to the jury on behalf of the *Consistoire Israélite de France* and the B'nai B'rith of France, March 13, 1998, reprinted in Jean-Marie Matisson, ed., *Chronique quotidienne*, at <http://www.matisson.com/affaire-papon/chronique_quotidienne.htm> (emphasis added in English translation above).

153. *Id.* (Emphasis added in English translation.)

154. See *supra* note 67 and accompanying text. See also Weiler, *supra* note 2, at 12; Weiler, *Parlement européen, intégration européenne, démocratie et légitimité*, in *LE PARLEMENT EUROPÉEN DANS L'ÉVOLUTION INSTITUTIONNELLE* 325, 334 (Jean-Victor Louis et al. eds., 1988). Weiler notes that the United States' Constitution's formal legitimacy can be attacked for violating the Articles of Confederation. *Id.* at 338. Weiler distinguishes between formal legitimacy (when the official, legal requirements have been followed) and social legitimacy (when the government enjoys broad societal support), noting that democratic Weimar Germany had little social legitimacy, while undemocratic Nazi Germany enjoyed a great deal for many years. Weiler, *supra* note 2, at 18-19. According to these criteria, Vichy enjoyed social legitimacy until 1942, when the Resistance ranks swelled in response to increasing German demands for French labor and the growing prospect that Germany was going to lose the war. Weiler also notes that social legitimacy can prevail even where large segments of society do not approve of specific governmental measures, provided that a majority of the population approves of the underlying rules. Weiler, *Parlement européen, intégration européenne, démocratie et légitimité*, *supra*, at 334. See also Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 712 (1988) (signaling four constituent elements of legitimacy: "determinacy, symbolic validation, coherence and adherence").

155. Weiler, *supra* note 2, at 12. See also Richard S. Kay, *Legal Rhetoric and Constitutional Change*, 7 CARRIBEAN L. REV. 161, 162 (1997) ("we would call a change

In all of the Nazi-conquered nations of Europe, France alone had a collaborationist government that was neither selected nor imposed by the Germans. Those who contest Vichy's status as the French government from 1940 to 1944 must contend with Pétain's having derived his power from democratically elected representatives of the French following established legal procedures, and with the fact that the majority of the country considered him at the time to be the legitimate head of state. If one accepts the premise of legality, however, the question arises as to how nearly two centuries of tolerance and respect for human rights could collapse in France with such lightning speed.

The answer is that it did not die with lightning speed. The groundwork for exclusion and xenophobia was laid in the prewar years of the 1930s and even earlier. In 1938 and 1939, laws revoking citizenship and rabid attacks against Jews in the press inspired the *Loi Crémieux*, outlawing racial and religious libel and slander.¹⁵⁶ Anti-democracy was a respectable intellectual position.¹⁵⁷ Indeed, according to Henri Amouroux, long-time historian of the Occupation, Vichy's antisemitic laws appeared normal because pre-war antisemitic media propaganda had paved the way for them.¹⁵⁸ French legal

revolutionary if it made a great enough change in the political underpinning of state authority—even if it were accomplished with a punctilious regard to existing rules of constitutional change"); Otto Kirchheimer, *The Rechtsstaat as Magic Wall*, in *THE RULE OF LAW*, *supra* note 30, at 254 ("the *Rechtsstaat* concept can be honored by scrupulous observation of all prescribed forms and proceedings while its spirit is constantly violated").

156. *But see* ROUSSO, *supra* note 67, at 19 ("Classical republican democracy was . . . deeply rooted in French habits") (quoting Maurice Agulhon, *Les Communistes et la libération de la France*, *LA LIBÉRATION DE LA FRANCE* (1976)); *accord*, DE TOCQUEVILLE, *supra* note 1, at 317 ("Ceux qui ont étudié attentivement la France au XVIII^e siècle, ont pu voir naître et se développer dans son sein deux passions principales . . . L'une . . . est la haine violente et inextinguible de l'inégalité. Celle-ci était née et s'était nourrie de la vue de cette inégalité même, et elle poussait depuis longtemps les Français à vouloir détruire jusque dans leurs fondements tout ce qui restait des institutions du moyen âge, et . . . à . . . bâtir une société où les hommes fussent aussi semblables et les conditions aussi égales que l'humanité le comporte. L'autre . . . les portait à vouloir vivre non seulement égaux, mais libres.")

157. *See* WEBER, *supra* note 32, at 265. Interestingly, in Germany, Nazi legal theorist Carl Schmitt professed anti-liberalism but not anti-democracy. Schmitt claimed that Nazism was a *nonliberal democracy*, based on the *Führerprinzip*. *See* Otto Kirchheimer, *Remarks on Carl Schmitt's Legality and Legitimacy*, in *THE RULE OF LAW*, *supra* note 30, at 64-98; Kirchheimer, *State Structure and Law in the Third Reich*, in *id.* at 142-71.

158. Interview with Amouroux in *Figaro littéraire*, *supra* note 151, at 5. For the philosemitic propaganda of Vichy opponents, see *La Propagande philosémite*, in LAZARE, *supra* note 105, at 151-163. *Accord*, Marrus, *Les juristes de Vichy dans "l'engrenage de la destruction,"* in *LE DROIT ANTISÉMITES*, *supra* note 5, at 53. For the virulent, widespread antisemitic propaganda which appeared in the French press earlier in the century, see PIERRE BIRNBAUM, *LES FOUS DE LA RÉPUBLIQUE: HISTOIRE POLITIQUE DES JUIFS, DE GAMBETTA À VICHY* (1992).

scholarship of the 1920s and 1930s expressed antisemitism frequently,¹⁵⁹ and administrative documents used the term "Jew" with increasingly pejorative connotations in the 1930s.¹⁶⁰ As one scholar has put it, "there was a Vichy before Vichy" ("*il y eut un Vichy avant Vichy*").¹⁶¹

France's history prior to 1940 was a complex mixture of different strains and undercurrents, rather than a linear progression of tolerance from the Declaration of the Rights of Man onwards. Robespierre's Reign of Terror occurred after the Revolution, and the Dreyfus affair at the turn of the century foreshadowed Vichy in numerous ways.¹⁶²

VI. Democracy's Post-Mortem: Vichy's Systems of Symbols

At all levels, exclusionary measures were couched in a rhetoric designed to reassure, and to disguise the substantive rupture they represented with the past legal system and culture's values of inclusion and non-discrimination. Institutional rhetoric mimicked the rhetoric of legislation, thus maintaining an aura of continuity (designed to convey the comfort of long-standing traditions and established authority) while simultaneously cementing and appealing to a growing ethos of hierarchization and exclusion. Typical of Vichy's institutional rhetoric was the language in the letters sent to Jewish professionals, announcing that they no longer were allowed to continue their professional lives.

The following was the standard form letter sent by Vichy's medical council¹⁶³ to inform Jewish physicians that henceforth they were barred from practicing medicine in France. The letter preserved every formal, outward attribute of solicitous respect and French *politesse*, including, in perhaps its greatest irony, the expression of confraternity due one physician from another (for the addressee was, until the letter went into effect, still a colleague in the medical profession). Finally, there is the expression of regret, as if to an invitee being disinvited to a social occasion for reasons beyond the control of the messenger:

159. See Dominique Gros, *Peut-on parler d'un "droit antisémite"?*, in *LE DROIT ANTISÉMITES*, *supra* note 5, at 13, 17.

160. See BIRNBAUM, *supra* note 158, at 420.

161. Broussolle, *supra* note 5, at 115, 118 (quoting F.G. DREYFUS, *HISTOIRE DE VICHY* (Fayard 1990)).

162. On the Dreyfus affair as a continuing subtext of Vichy's persecution of Jews, see *infra* note 267. See also SINGER, *supra* note 21, at 17 (suggesting that French antisemitism may have been stronger during the Dreyfus Affair than in 1940).

163. Pétain formed various councils or "*conseils*" to implement Vichy's exclusionary laws. These bodies were hand-picked for antisemitic leaders who would be zealous in fulfilling their task of excluding Jews and unsympathetic to arguments for exceptions.

My dear Colleague,¹⁶⁴

Pursuant to the law of 2 June 1941 and the Decree of 11 August 1941, the *Conseil de l'Ordre*¹⁶⁵ has the regret to inform you that your name will cease to appear on the list of physicians of the Seine precinct within two months' time from the present.

The *Conseil* was led to make this decision by reason of the limitation to 2% of the number of Israelite¹⁶⁶ physicians, a percentage currently filled by the physicians entitled to benefit from Article 3 of the law of 2 June 1941, and to whose number it is not possible to add you.

Moreover, it has been brought to the *Conseil's* attention that you were not able to be on the list of Israelites who are eligible for authorization to continue to exercise their professions as exceptions to the law.¹⁶⁷

The *Conseil de l'Ordre* reminds you that its decision may be appealed within 15 days to the *Conseil Supérieur de l'Ordre*. Such appeals do not delay the decision's entry into effect.

Be so kind, my dear Colleague,¹⁶⁸ as to accept the expression of my collegial/confraternal sentiments.¹⁶⁹

164. The word used in French is warmer than the English "colleague" (and indeed the French equivalent to "colleague" would be "*collègue*"). The French term used here was "*confrère*," which, in addition to collegiality, also connotes brotherhood in a professional fraternity.

165. See *supra* note 163.

166. For the connotations of the term *Israélite*, see *infra* note 184 and accompanying text.

167. The exclusionary laws on their face permitted exceptions, thus appearing to make concessions for French-born Jewish professionals if they could establish an unblemished reputation and illustrious heritage of service by themselves and their ancestors to the glory of France. In fact, however, exceptional status virtually never was granted, as the arbiters of the decision were not members of the relevant professions, but, rather, officials at the *Commissariat aux questions juives*, an administrative body whose officials were selected for rabid antisemitism, and whose head, Xavier Vallat, routinely refused all exemption requests. See *Du côté du commissariat général aux Questions juives*, in BADINTER, *supra* note 103, at 165-171. Also see SINGER, *supra* note 21, at 262, for the decision of a Jewish professor to refuse to apply for exemption from the antisemitic laws that ousted him from his teaching position. Similarly, Lucien Vidal-Naquet, the father of historian Pierre Vidal-Naquet, was a well-known lawyer at the Paris bar who refused the bar association's efforts on his behalf to exempt him from the racial law which disbarred him. Unbeknownst to him, however, his gesture of refusing any special privileges occurred after higher authorities at the *Commissariat* had already stricken him and others from the list of the exempted, though all in question were French Jews of old French families with illustrious past military service to the country. Lucien Vidal-Naquet and his wife were to die in Auschwitz. See Vidal-Naquet, *supra* note 25, at 198. See also ARON, *supra* note 24, at 162 (discussing Lucien Vidal-Naquet's courageous conduct).

168. See *supra* note 164.

169. A copy of one such letter, sent in 1942, is reprinted in *l'Express* at 18, semaine du 9

The above letter was part of the initially unobtrusive and progressively more manifest "*désémitisation*" or "desemitizing" of France's professions and government positions which Pétain had set in motion within weeks of gaining dictatorial power. The rhetoric of desemitization, couched in replications of standard official rhetoric, camouflaged the harsh nature of the desemitization measures, forming a terrain on which Vichy officials could tread cautiously while they tested the country's reactions.¹⁷⁰

The antisemitic policy met with negligible opposition from the French population.¹⁷¹ Indeed, the new régime generally benefited from popular approval or acceptance throughout 1940 and most of 1941. By 1942, and perhaps even the end of 1941, however, the winds of popular sympathy were turning. The shift from pro- to anti-Vichy was itself composed of heterogeneous and fluctuating views. Neither Vichy's supporters nor its opponents had homogeneous or frozen outlooks. Public opinion was also influenced by Vichy's legislative measures. Popular sentiment encompassed a huge variety and complexity of motivations and reactions, and was itself a process in flux rather than a fact or an event. Vichy France consequently provides an arresting example of ways in which myriad views and discourses coexist and shift within a nominally single polity, resulting in disparate experiences and disparate contemporaneous as well as subsequent renditions of the period. Such multiple perspectives and discourses consequently mold the categories that become points of reference for future generations, as they attempt to define and redefine national and individual memory, as well as to seek in the past instruction for the future.

The 1941-1942 shift in French opinion with respect to the treatment of Jews was, principally, neither a cynical response to Germany's deteriorating military situation nor representative of a

au 15 octobre 1997.

170. Thus, in November, 1941, the German military wrote the following letter to Pétain's General Commissary on Jewish Questions, with respect to the total elimination of France's Jews: "The [German] occupying authorities did not wish to take into their own hands, in place of the French Government, the elimination of the Jews of France. *It is only because in the fall of 1940, the French Government, concluding that the political climate did not allow for it to take those measures for itself, that the Militärbefehlshaber [i.e., German Military Commander] was forced to intervene in the interest of the occupying army and those first measures necessarily led to others.*" This letter appears in French translation from the original German in a publication of the French Center for Contemporary Jewish Documentation, BILLIG, *supra* note 12, at 19 (emphasis added).

171. For a book devoted entirely to the subject of French public opinion under Pétain, see LABORIE, *supra* note 13. See also H.R. KEDWARD, *IN SEARCH OF THE MAQUIS; RURAL RESISTANCE IN SOUTHERN FRANCE 1942-1944* (1994) (containing extensive and persuasive references to public opinion as reflected by southern French police surveillance exhaustively studied by its author).

profound sense of solidarity with Jews. It was instead a combination of (1) widespread feeling that the antisemitic laws already had solved a very real "Jewish problem" of previously excessive Jewish influence in French professional, public and financial life;¹⁷² (2) increasing disenchantment with Germany, as it robbed and brutalized France and conscripted its youth for labor in Germany; and (3) a growing consciousness of Germany's diminishing chances for ultimate military success. The last two reasons are often given as explanations for the anti-German shift in opinion. Similarly, much has been written about the indignation of the French at the sight of Jews forced to wear the yellow star, of the Jewish round-ups, and the wrenching scenes of families torn apart.¹⁷³

A complexity and variety of motives and emotions coexisted and evolved, however, within the same individuals, rather than representing various outlooks of different people. The French welcoming of antisemitic laws and wish to see Jews disappear from perceived positions of power and political and financial dominance was not the unyielding "eliminationist" animus that Goldhagen has attributed to the German population.¹⁷⁴ French people who felt satisfied that Jews were now neutralized and no longer posed a threat were better able to feel compassion later at the humiliating treatment to which Jews were subjected, as well as at the horrific consequences of incarceration, forced family separation, and deportation deriving from their deprivation of legal protection. Compassionate feelings were no doubt further facilitated by a growing awareness of German brutality against non-Jewish French people, and the emerging likelihood that the Allies would be the ultimate military victors.¹⁷⁵

172. Jews constituted .25 percent of the population of Paris in 1939, but were more than 30% of its bankers, 12% of its doctors, 10% of its lawyers and 12% of its journalists. MICHEL ROBLIN, *LES JUIFS DE PARIS: DÉMOGRAPHIE, ÉCONOMIE, CULTURE*, 105-9 (1952). The recently discovered police file on Professor Adolphe Steg's father states the following cause for the elder Mr. Steg's incarceration in Beaune-la-Rolande (one of the French camps from which deportations to Nazi concentration camps proceeded): "surplus in the national economy" ("*en surnombre dans l'économie nationale*"). President Chirac quoted this in his December 5, 1997 speech, at a ceremony to deposit a cache of recently discovered files on Jews with the *Centre de documentation juive contemporaine*. For the text of Chirac's speech, see *le "Fichier juif" au Mémorial*, 162 *REVUE D'HISTOIRE DE LA SHOAH* 203, 206-209 (1998). For further discussion of the *fichier juif* affair, see *infra* note 217.

173. See, e.g., DALADIER, *supra* note 6; KLARSFELD, *supra* note 134, at 163-192.

174. See GOLDHAGEN, *supra* note 123; *accord*, GLASS, *supra* note 123.

175. Although he does not discuss it directly, Klarsfeld implies a similar conclusion as to non-Jewish French sentiment. See KLARSFELD, *supra* note 134, at 7 *et seq.* He at least implicitly recognizes the particular interplay of sentiments I describe above and which I consider crucial to the opinion shift: the combination of initial antisemitism with limits to the same. My references to public opinion are to the majority of the French population, not to individuals. There were individuals who opposed the antisemitic measures from the

Thus, the shift in public opinion was due to Vichy's appeasement of the population's antisemitic aspirations to be rid of what it deemed excessive Jewish presence and influence, rather than a reaction *against* those measures, or a mere concession to opportunism or newly discovered anti-German sentiment. When one views the opinion shift in this manner, it becomes less mystifying that even people with the courage to take risky anti-Nazi stands were not inclined *initially* to protest Vichy or Nazi measures against their Jewish colleagues and neighbors. The limited, or perhaps delimited, antisemitism which was common in France, is captured in the following protest against Jewish round-ups by France's Bishop Deloy in 1942:

[W]e fully acknowledge that our country has the right to take every useful measure to defend itself against those who, especially in recent years, have hurt it so much, and that it has the duty to punish severely all those who have abused the hospitality so liberally bestowed upon them. But the rights of the State have limits.¹⁷⁶

Richard Weisberg concludes that, ultimately, the resounding silence with which the non-Jewish French population received the antisemitic laws stemmed from its initial general welcoming of those measures.¹⁷⁷ Weisberg documents the non-Jewish French bar's feeling that Jews were over-represented in the professions, that recent Jewish immigrants were changing the French style of practice—in short, that there was a Jewish problem, and that the antisemitic laws addressed the problem in the right direction, even if they erred in also targeting harmless Jews from old French Jewish families, individuals whom most of the non-Jewish French population perceived as not meriting exclusion from their professions.¹⁷⁸

Like the legal profession, the medical profession expressed animosity towards its Jewish members. In July of 1940, within mere days of France's military defeat and Pétain's accession to power, the medical union of Seine-et-Oise sent Pétain a letter, proposing the elimination of foreigners and Jews from the profession, decrying the

start, and individuals who, like de Gaulle, believed from the start that Germany would lose the war.

176. *LE PROCÈS DE XAVIER VALLAT PRÉSENTÉ PAR SES AMIS* 497 (1948), *cited in LE DROIT ANTISÉMITTE*, *supra* note 5, at 29. Sartre captured a particular brand of French antisemitism residing within some of those who protested Vichy persecution: "During the occupation, the democratically-minded person was deeply and sincerely appalled by the antisemitic persecutions, but he occasionally sighed: 'The Jews will return from exile with such insolence and desire for revenge that I fear a resurgence of antisemitism.'" JEAN-PAUL SARTRE, *RÉFLEXIONS SUR LA QUESTION JUIVE* 69 (1954). Clearly, it was not a resurgence of antisemitism which preoccupied such speakers foremost.

177. *VICHY LAW*, *supra* note 16; *accord* BADINTER, *supra* note 103.

178. *See VICHY LAW*, *supra* note 16, at 84-85.

alleged Jewish "basely commercial mentality" that was degrading the practice of medicine in France.¹⁷⁹

With respect to the legal profession, Weisberg notes the statement of Jacques Charpentier, head of the Paris Bar Association, to the effect that the Paris Bar had suffered from a Jewish problem that Pétain's laws sought to remedy. Charpentier was a man of courage, prepared to be inflexible to Vichy and German demands when it came to defending his profession's proud heritage of independence.¹⁸⁰ Charpentier also made efforts on behalf of persecuted Jewish colleagues, so long as they were considered *français de vieille souche*, from established French families.¹⁸¹ He did not, however, protest Vichy's initial exclusion of Jews from the legal profession.¹⁸²

An equally characteristic example of the French attitude is revealed in the following letter, written in 1941 by Philippe Henriot, a member of the last Parliament of the Third Republic and a devout supporter of Pétain.¹⁸³ The letter was addressed to a French Jew:

I feel that you are anxious without reason. With respect to the

179. Reprinted in *l'Express*, no. 2414, week of 9 October, 1997, at 18.

180. See VICHY LAW, *supra* note 16, at 21-22, 85. Charpentier demonstrated courage by agreeing to represent former prime minister Reynaud (imprisoned by Pétain as an alleged menace to the new order) and by suggesting in October of 1941 that he try to organize a protest against German propaganda attempts to smear Reynaud. See REYNAUD, *supra* note 6, at 38, 68, 142 (entry for October 18, 1941).

181. Concurring with Weisberg, Badinter points out that the very act of saving a few Jews' professional lives meant accepting, and at least indirectly sanctioning, that all other Jews would be excluded from their professions and livelihoods. Badinter asks rhetorically what remained of the principle, so touted by France's bar associations, that all lawyers enjoy equal rights in their professions. See BADINTER, *supra* note 103, at 117. Badinter's criticism should be examined in the context of the larger problematic of what it means to exist in a totalitarian society. Holocaust literature is replete with survivors' tormented conclusion that any Jewish camp inmate's survival inevitably was at the expense of others who died in his or her stead. This issue is discussed, both in personal and historical terms, throughout the works of Elie Wiesel, Bruno Bettelheim, Viktor Frankl and Primo Levi, and in historico-philosophical terms by Hannah Arendt. For further discussion of this issue, see Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 44 (1994).

182. Indeed, Charpentier wrote that "certain professions, including our own [legal profession], require a minimum of assimilation.... In this respect, Vichy's policy coincided with our professional interests." JACQUES CHARPENTIER, *AU SERVICE DE LA LIBERTÉ*, 127 (1949), *quoted in* BADINTER, *supra* note 103, at 38.

183. Henriot should not be confused with the similarly named *Herriot*, also a member of parliament, who courageously defended the *Massilia* group. See *supra*, note 46, and surrounding text. Henriot, the author of this letter, was assassinated by the Resistance. In reprisal for his assassination, the French *milice* of Vichy murdered seven Jews. The decision to murder them was made by Paul Touvier, and it was this decision by Touvier that was the subject of his 1992 trial, discussed *infra*, notes 274 to 278, and surrounding text.

Jews, it is never for one moment a question, in our minds, of Frenchmen like you. It is my understanding that, in the statute currently being drafted, it is explicitly specified that people who have been French for so many generations, French [also] by their conduct, citations, decorations, services rendered—other of course than financial services, which often are only alibis—are to remain French without qualification.

You know very well that we are thinking only of Jews, and not of French people of the Hebrew religion. If our campaigns against those people upset you, they should not. . . . Let me tell you that one of my colleagues from the Chamber [of Deputies of the National Assembly], who in former times was my most vociferous political opponent, was a Jew.¹⁸⁴ It was Pierre-Bloch, Deputy from the Aisne district. I had the great pleasure of seeing him again the other day. Magnificent soldier that he is, cited, decorated, escapee [from a German prisoner-of-war camp], do you suppose for one second that our [anti-Jewish] campaigns target such men as he? The French people has the good sense not to be mistaken on this point. It has long made these distinctions.¹⁸⁵

The term Henriot uses to contrast with the derogatory "Jew" is "*Français de religion israélite*." "*Israélite*", which I imperfectly translate here as "Hebrew", is a term that the French Jewish community had chosen to use in self-description since the nineteenth century, preferring it to "*juif*."¹⁸⁶

184. Interestingly, although Henriot has just taken pains to explain the difference in his eyes between the undesirable "Jew" and the worthy "Frenchman of the Hebrew religion," in the present sentence, Henriot nevertheless uses the word "Jew" to describe a man he is about to praise.

185. This letter is quoted in its entirety in PIERRE-BLOCH, *supra* note 14, at 184-85. Incidentally, Pierre-Bloch, the deputy for whom Henriot professes affection and admiration in the above passage, despised and reviled Henriot as a collaborator and antisemite. *See id.*

186. For a history of this matter, see Paula Hyman's excellent book, FROM DREYFUS TO VICHY: THE REMAKING OF FRENCH JEWRY, 1906-1939 (1979). In a fascinating passage, the identical contrast between *juif* and *israélite*, similarly condemning the former and praising the latter, had been made half a century earlier by none other than Bernard Lazare, Jewish defender of Dreyfus, who described the *juifs* as characterized "by fraud, lying and trickery," in contrast to the French *israélites*. *See* BERNARD LAZARE, ENTRETIENS POLITIQUES ET LITTÉRAIRES, I, 177, 179, 232 *et seq.* (1890), *quoted in* WEBER, *supra* note 32, at 290. *See also* Philippe Oriol, *Bernard Lazare: le premier qui se leva pour le juif martyr*, in MIL NEUF CENT: REVUE D'HISTOIRE INTELLECTUELLE (CAHIERS GEORGES SOREL) 63-65 (1993); BADINTER, *supra* note 103, at 15 (noting the increasingly xenophobic attitude in France before the war, including among French Jews). *Accord* ARON, *supra* note 24, at 18 (noting hostility of French Jews towards foreign Jews).

French Jewish contempt for foreign Jews often reflected the sentiments of much of the non-Jewish population, and is reminiscent of the French aristocracy's enthusiasm for revolution in another time, about which de Tocqueville wryly commented that "the only thing the nobles lacked to effect the Revolution was the rank of commoners." ALEXIS DE

In fact, notwithstanding Henriot's declarations in his letter, Vichy's laws did *not* make any distinctions between Jews of French or foreign extraction. Many thousands of the people Henriot proclaimed to be beyond the aim of the antisemitic laws he endorsed, including Pierre-Bloch, the very individual his letter praised as being beyond the target of Vichy's racial laws, *were* among their targets and victims. Thousands of Jews born in France to families that had been French for generations were impoverished by "aryanization" laws depriving them of their assets, and then arrested, delivered to the Germans, deported and murdered.¹⁸⁷

The substantive inaccuracy of Henriot's letter offers an illuminating view of French antisemitism from a comparative perspective. Vichy's legal definition of "Jew", like its Nazi German counterpart, did not depend in any way on foreign birth or ancestry. Nevertheless, in France, in contrast to Germany, the popularly perceived target seems to have been the foreign Jew.¹⁸⁸ In his brilliant work on the languages of totalitarianism, Jean-Pierre Faye points out that the Germans used the term "race" in the sense of "species" rather than of race, relegating Jews to the non-human, such that their individual characteristics became irrelevant considerations.¹⁸⁹ French antisemitism stands in contrast to that of Nazi German officials and legal scholars who advocated complete indifference to the individual attributes of persons of Jewish extraction. French animus in its most widespread form did not reach such complete deindividualization.

TOCQUEVILLE, *THE OLD RÉGIME AND THE FRENCH REVOLUTION*, 272 (1955), *quoted in* MARKOFF, *supra* note 15, at 66.

187. The Paris *Centre de documentation juive contemporaine et mémorial du martyr juif inconnu*, located at 17, rue Geoffroy L'Asnier, Paris (4th arrondissement), was a rich source of research for this article. The *Centre* consists of archives, a library and museum exhibits. It contains numerous letters by such Jews *de vieille souche* as I describe above, often requesting exemptions from imprisonment, not for themselves, but for children and grandchildren, on the basis of their own brilliant and previously recognized service to France. Perhaps the measure of what it cost these men to write such letters is revealed by their frequent proud refusal to ask for release or relief of any kind for themselves.

188. Of an estimated 330,000 Jews in France in 1940, 24% were murdered. Approximately 43% of the foreign Jews in France were murdered. See ZUCOTTI, *supra* note 53, at 3; see also LEVIN, *supra* note 12, at 427-28; PAXTON, *supra* note 6, at 183.

189. See FAYE, *supra* note 21, at 366-67 (discussing in particular Nazi legal theorist Carl Schmitt and the German statute prohibiting copulation between Jews and non-Jews). In contrast, while Vichy law prohibited intermarriage, it did not extend to criminalizing sexual relations. In pre-war France, a French antisemite also advocated the prohibition of sexual relations and marriage between Jews and non-Jews. See RENÉ GONTIER, *VERS UN RACISME FRANÇAIS* (1939), *quoted in* SERGE KLARSFELD, *LE STATUT DES JUIFS DE VICHY* 9 (1990); see also VICTOR KLEMPERER, *LTI [LINGUA TERTII IMPERII]: NOTIZBUCH EINES PHILOLOGEN* (1975; originally published in 1947) (analyzing language of the Third Reich).

VII. The Frayed Threads of Memory: Post-War Representations and Significations

Vichy France powerfully illustrates the vital, dynamic and active function that representations of memory acquire in society.¹⁹⁰ The Vichy period provoked a crisis of national identity in post-war France, as increasing challenges were brought to bear on official post-war definitions and categorizations that sought to erase Vichy from French national history by delegitimizing it and consequently denying its very existence as a government of France.¹⁹¹ Outside of France, Vichy also raises intricate problems of the nature of governmental legitimacy, the value and functions of law, the ability of constitutional democracies to assure inclusiveness to minorities, the nature and consequences of law's ineradicable connection with language, and the capacity of democracy to sustain itself in times of crisis.

Since the war, Vichy has been represented variously as a puppet government of Nazi Germany, an illegal gang that never gained the legal status of government, and the lawful government of France from 1940 to 1944. These different interpretations of Vichy reflect different realities of the period for the various individuals and communities living through it. Some interpretations also represent more of an effort to reconcile the period with preexisting political theories or objectives than a desire for accuracy. I argue here that Vichy was not merely an aberration or an alien phenomenon in an otherwise fundamentally coherent body politic, and that Vichy should be incorporated into the memory and identity of France as a French phenomenon in the contexts of its times. I suggest a pluralistic assessment of Vichy and, by implication, of French identity and history. One cannot understand France without Vichy or Vichy without France, and it is in the context of France's long-standing constitutional democracy that Vichy emerges as instructive for identifying democracy's self-corrosive characteristics and potentials.

The speed and facility with which Vichy came into existence on the heels of France's military defeat reflected, *inter alia*, the popularity of its self-representation as the antithesis of the Third

190. On representations of memory as an active social force, see RAPHAEL SAMUEL, *THEATRES OF MEMORY*, at X (1994) (memory as "dialectically related to historical thought, rather than being some kind of other to it"). See also Pierre Nora, *Entre Mémoire et Histoire: La problématique des lieux*, 23-43, in I *LES LIEUX DE MÉMOIRE* (Pierre Nora ed., 1997) (analyzing history and memory's interactions, oppositions and mutual dependence).

191. See *infra* text accompanying note 199 for de Gaulle's statement that Vichy never existed. Succeeding French statesmen up to and including Mitterrand maintained this position, as did Mitterrand's Minister of Justice, Robert Badinter, himself a Jewish holocaust survivor and scholar of the Vichy period.

Republic. Vichy benefited from a widespread rejection of the Third Republic across the political spectrum, a rejection that was to have implications not only for Vichy but also for the post-war government.¹⁹² Political conservatives, monarchists and the Catholic Church had long been opponents of the Third Republic. Some opposed the particular government, while others frankly opposed parliamentary democracy. In the 1930s, the press battered the régime on a daily basis. Discontent with the Third Republic was common also among liberals, who felt that the government was ineffectual and the system incapable of solving the country's urgent economic and social problems, including massive immigration, unemployment and perceived governmental corruption. The collapse of 1940 resulted from, *inter alia*, the political crises and instability of the 1930s, when the average lifespan of a French ministry was six months.¹⁹³

The growing prominence of foreigners, particularly foreign Jews, in France's public, financial and cultural spheres distressed many in the French population, cutting across a broad swath of differences among those reacting negatively to foreigners.¹⁹⁴ In the aftermath of France's national trauma at its unexpected military defeat, most French people were relieved and grateful to see Marshal Pétain take the reins of government, or at least did not oppose him.¹⁹⁵ As had been the case in 1789, virtually all groups in France in 1940 were open to change, if not eager for it.¹⁹⁶

192. See, e.g., Stanley Hoffman, *Paradoxes of the French political Community*, in *IN SEARCH OF FRANCE* 14-15 (Stanley Hoffman ed., 1963); PIERRE-BLOCH, *supra* note 14, at 46 (widespread attacks on parliamentarianism, the Republic and democracy in France during the 1930s). For similar German disenchantment with Weimar, see TURNER, *supra* note 5; GAY, *supra* note 30.

193. De Gaulle notes in his memoirs that France had 102 governments between 1875 and 1940, while Great Britain had 20 and the United States 14. See DE GAULLE, *supra* note 102, at 276. Cf. Rogoff, *supra* note 1, at 64 n.186 ("From 1791 to 1958, French systems of government oscillated from broadly representational, but ineffective, to authoritarian.").

194. See, e.g., LABORIE, *supra* note 13, at 125-54. The prominent role of the exile in France of the 1930s offers some striking parallels with the situation in Weimar Germany. Peter Gay goes so far as to claim that "Weimar culture was the creation of outsiders, propelled by history into the inside, for a short, dizzying, fragile moment." GAY, *supra* note 30, at xiv.

195. See LABORIE, *supra* note 13, at 228 *et seq.*; PHILIPPE BURRIN, *FRANCE UNDER THE GERMANS: COLLABORATION AND COMPROMISE* 18-20 (Janet Lloyd trans., 1996).

196. See, e.g., ANDREW SHENNAN, *RETHINKING FRANCE: PLANS FOR RENEWAL 1940-1946*, at 10 (1988) (widespread desire in France across political spectrum for "a complete break with the pre-war status quo"); Stanley Hoffman, *The French Political Community*, in *IN SEARCH OF FRANCE*, *supra* note 192, at 48 ("dissatisfaction with parliamentarianism had become general"); William D. Irvine, *Domestic Politics and the Fall of France in 1940*, in *THE DEFEAT OF FRANCE: REASSESSMENTS* 85 (Joel Blatt ed., 1998), citing SERGE BERNSTEIN, *LA FRANCE DES ANNÉES* 30, 170-171 (1993). For

France's post-war officials trod a narrow path, anxious to repudiate Vichy, but also determined to distance themselves from Vichy's predecessor, the much-reviled Third Republic. Many in post-war French government, from de Gaulle to Mitterrand, including Badinter, a former French Jewish Minister of Justice and President of France's Constitutional Council (whose father was murdered in Auschwitz), have maintained that France is France only when it is a republic, and, therefore, that post-war France is not responsible and can not be held accountable for Vichy's acts.¹⁹⁷ This view is in keeping with France's official identification of itself, as reflected in the post-Occupation *ordonnance* of August, 1944, which declared that "the form of France's government is and remains a republic . . . in law, [and the Republic] never ceased to exist."¹⁹⁸ This was also de Gaulle's position. When asked in 1944 to proclaim the Republic, he refused, saying, "The Republic has never ceased to be. Free France, fighting France, the French Committee of National Liberation have each in turn embodied it. Vichy always was and remains null and void. I myself am the president of the government of the Republic. Why should I proclaim it?"¹⁹⁹

De Gaulle in effect recategorized the French to exclude collaborators, and to include the Resistance, the Free French, and other opponents of Germany, thereby permitting the conclusion that Vichy was a non-French, alien phenomenon, created in the shadow of German guns, with no claim to recognition as a legitimate government. De Gaulle's sweeping nullification of Vichy thus was premised on a recategorization of those who *qualified* as French. Although substantively at dramatic odds with the Vichy recategorizations that had excluded Jews and naturalized foreigners, de Gaulle's technique, like Vichy's, was to reclassify Frenchness to meet a new political agenda. Both Vichy and de Gaulle essentially created new definitions for old terms in order to resolve or avoid problems and contradictions that the prior status quo otherwise would have generated, and to foster new associations and concepts without acknowledging their novelty.²⁰⁰

similarly widespread receptivity to the idea of change in 1789, see MARKOFF, *supra* note 15, at 67. *Accord* DE TOCQUEVILLE, *supra* note 1.

197. See Alfred Grosser, *Du bon usage de la mémoire*, in JUGER SOUS VICHY, *supra* note 68, at 107, 112.

198. *Quoted in* Dominique Rousseau, *Vichy a-t-il existé?*, in JUGER SOUS VICHY, *supra* note 68, at 97, 103.

199. CHARLES DE GAULLE, *MÉMOIRES DE GUERRE: L'UNITÉ 1942-1944*, at 308 (1956).

200. Accordingly, French post-war memorials to Vichy's victims suggested only German guilt, even when the perpetrators of murders had been French. Thus, the 1946 memorial to Georges Mandel, erected where Mandel had been murdered by members of

In her analysis of de Gaulle and the texts he produced, literary semiotician and psychotherapist Julia Kristeva, ruminates on de Gaulle's promotion of the symbolic over the real, and what she refers to as his taste for interpretive systems that defy truths (his "*goût des systèmes qui bravent les réalités.*")²⁰¹ Kristeva analyzes de Gaulle's rhetoric in Freudian terms, noting among others his self-identification with France. She describes de Gaulle's rallying cry of June 18, 1940 from London, in which he invited the French to continue the war against Germany, and urged all fighting Frenchmen to join him, as consisting of a call to himself, only on the surface addressed to France: "The great Charles without a land who speaks to *himself* when he addresses a France whom he is." ("*[L]e grand Charles sans terre qui se parle en s'adressant à une France qu'il est.*")²⁰²

Significantly, in his war-time memoirs, de Gaulle declared that France could not be France without grandeur. ("*La France ne peut être la France sans grandeur.*")²⁰³ If Kristeva's theory can be extended, de Gaulle's conflation of himself with the nation offered a seductive national refuge to post-war France, for the French to shed their guilt for Vichy by adopting de Gaulle's myth of synonymity between himself and the nation. Thus, during the war, de Gaulle became an icon for the proposition that France no longer existed, but that he, de Gaulle, did exist, and he was great, and therefore of necessity so too were the French.²⁰⁴ Since France could not but be great, and could not but be a republic, Vichy *could not but not have been*. It thus could be stricken from national history and memory.

This willed confusion of de Gaulle with France also appeared in a song popular in France in 1944, when Germany's defeat was imminent:

Tous les Français sont enfants de la Gaule

Vichy's French *milice* in the forest of Fontainebleau, contains the following inscription: "In this place, Georges Mandel died, assassinated by the enemies of France, on 7 July 1944." See ROUSSE, *supra* note 67, at 23. (The predictable, but untrue, inference viewers would be likely to draw is that Germans murdered him.)

201. Julia Kristeva, *La Nation et le verbe*, in LETTRE OUVERTE À HARLEM DÉSIR 48 (1990).

202. *Id.* at 46. For the entire text of de Gaulle's radio address of 18 June 1940, see Appendix 3 to SIMONNOT, *supra* note 45, at 281. The importance of the self-creation is also confirmed by the opening lines of de Gaulle's memoirs. See DE GAULLE, *supra* note 9, at 1.

203. See DE GAULLE, *supra* note 9, at 1. According to *le Figaro*, in 1958, de Gaulle warned U.S. Secretary of State Dulles that unless France was a world power, it would cease to be France. ("*Si la France cesse d'être mondiale, elle cesse d'être la France.*") *Le Figaro littéraire*, February 26, 1998, at 6 (untitled article by Alain Peyrefitte).

204. See Kristeva, *supra* note 201, at 51 ("*La France n'existe plus, or je suis la France, donc vous êtes grands.*") On the structure, appeals and functions of myths, particularly in political life, see CASSIRER, *supra* note 36. See also GILDEA, *supra* note 14.

Et les Gaulois étaient de fiers soldats
Voilà pourquoi le général de Gaulle
Sera vainqueur dans le dernier combat²⁰⁵

(All the French are children of Gaul
And the Gauls were proud soldiers
This is why General de Gaulle
Will vanquish in the final battle)

An unspoken subtext of the song was an identification of de Gaulle with the French Revolution, since a long tradition links the Gauls, as opposed to the Franks, with the French Revolution.²⁰⁶ Moreover, Eugen Weber states that "[a]ssertion of Gaulish descent stressed emancipation from servitude, or the need and moral duty to bring this about."²⁰⁷

This association was complicated, however, by Vichy's attempt to co-opt the connection, by equating the Gauls, not with revolution, but rather with the need to be conciliatory after military defeat, as the Gauls had been with Rome, allegedly engendering the Gallo-Roman tradition at the heart of French identity and culture. This link between Rome and Germany was spelled out in a 1941 speech by Gaziot, Vichy's minister of agriculture,²⁰⁸ and Vichy's hope to appropriate the gaullish myth for self-promotion was also reflected in its choice of the Gallic weapon as the model for Vichy's highest decoration, the *francisque*.²⁰⁹

Vichy's efforts to link Germany with Rome by analogy to France's gaullish past, however, ran counter to a widespread perception that Rome had been a conqueror with much to offer, while the ancient Germanic invaders had contributed nothing positive

205. See JEAN GALTIER-BOISSIÈRE, *MÉMOIRES D'UN PARISIEN* 908 (1994).

206. See WEBER, *supra* note 32, at 22. See also PIERRE CHAUNU & ERIC MENSION-RIGAU, BAPTÊME DE CLOVIS, BAPTÊME DE LA FRANCE: DE LA RELIGION D'ÉTAT À LA LAÏCITÉ D'ÉTAT 29 (Franks viewed as barbarians).

207. WEBER, *supra* note 32, at 33. See also MARC BLOCH, *MÉLANGES HISTORIQUES*, I, 95 (1963), *quoted in* WEBER, *supra* note 32, at 335 n.35 (petition of citizens of Paris to abandon "the infamous name" of Franks, "who had reduced the French to servitude, and a return to the name of *Gaulois*").

208. See Krzysztof Pomian, *Franks and Gauls*, in NORA, *supra* note 37, at 27-76.

209. The *francisque*, emblem of the Vichy régime, was also known as the *francisque gallique*. From the Latin "*francisca*," however, the term literally meant the "battle ax of the Franks." See entry for "*francisque*" in PAUL ROBERT, *DICTIONNAIRE ALPHABÉTIQUE ET ANALOGIQUE DE LA LANGUE FRANÇAISE* 744 (1972). For Vichy's attempt to appropriate Joan of Arc as a symbol of Pétain's new order, and for the contrary imagery of her Resistance symbolism, see REYNAUD, *supra* note 6, at 74. Joan of Arc remains a hotly contested symbol to this day, claimed by both the right and left wings of French politics. For attempts by both Vichy and the Resistance to appropriate other symbols, see Hoffman, *The French Political Community in Search of Itself*, in *IN SEARCH OF FRANCE*, *supra* note 192, at 35. For figures of potent symbolism throughout French history, see CHAUNU & MENSION-RIGAU, *supra* note 206.

to French identity or culture.²¹⁰ The implicit analogy Vichy tried to construct between Rome and Nazi Germany thus depended on ignoring popular mythology concerning Germany's historically negative role in France's development.

The Resistance did far better in appropriating France's gaullish ancestry as the symbol of the need to resist. Anti-Vichy forces relied on the ancient contrast between Gauls and Franks, on the link between the Gauls and the French Revolution, and on numerous contemporaneous rhetorical opportunities providentially afforded by the name of General de Gaulle. His name's symbolic value became a potent rallying force. While Sartre wrote plays set in antiquity which camouflaged his anti-German message and passed the German censor,²¹¹ the anti-Nazi French congregated in apparent political innocence on the Champs-Élysées carrying two fishing poles, because in French two fishing poles are "*deux gaules*," a homophone of "*de Gaulle*."²¹² In his 1997 book of memoirs, de Gaulle's son makes the astonishing revelation that the family name had been spelled differently by its various branches, and that his father actually traced the name's ancestry primarily to Wales ("*Galles*"), not Gaul.²¹³ This fact was not publicized during the Vichy years.

De Gaulle's symbolic link to the Revolution of 1789 heightened the symbolism of Vichy as rupture from France. Further strengthening this dissociation were Vichy's frequent and explicit repudiations of the French Revolution.²¹⁴ Vichy's antisemitism also represented a repudiation of the Revolution in that the post-Revolutionary régime had granted the Jews of France full citizenship, and was therefore, depending on one's perspective, blamed or revered for the emancipation of Jews in France.²¹⁵

210. See FUSTEL DE COULANGES, *HISTOIRE DES INSTITUTIONS POLITIQUES DE L'ANCIENNE FRANCE: L'INVASION GERMANIQUE ET LA FIN DE L'EMPIRE*, 225-26 (1891), cited in Pomian, *supra* note 208, at 65.

211. See, e.g., JEAN-PAUL SARTRE, *LES MOUCHES* (1944).

212. See AUBRAC, *supra* note 138 (reproducing numerous Resistance as well as Vichy and Nazi German tracts).

213. See PHILIPPE DE GAULLE, *MÉMOIRES ACCESSOIRES: 1921-1946*, at 9 (1997).

214. See JUDT, *supra* note 144, at 7 ("one of the few themes on which the denizens of Pétain's 'National Revolution' could initially agree was their wish to unmake the Revolution and its heritage"). Pétain and his cohorts were not alone in repudiating the French Revolution. It was equally anathema to Hitler, who explicitly boasted that he aimed to reverse the French Revolution. See ISAIAH BERLIN, *THE SENSE OF REALITY* 43 (1997).

215. The Napoleonic Code of 1804, generally considered the embodiment of the French Revolution, did not make any formal distinctions between Jews and other French citizens. For a qualification of this statement, based on the Civil Code's retention of the different oaths traditionally administered to Jews, see Jean-Jacques Clère, *Une émancipation tardivement contestée: Les exceptions apportées au principe d'égalité à l'égard des Juifs*

Nevertheless, the French Revolution introduced patterns that Vichy echoed, as would post-war Gaullism, in that the Revolution's political inclusiveness towards the Third Estate, and other "out-groups," such as peasants and Jews, reflected a selective approach to inclusion, not generalizable inclusiveness. The Revolution violently excluded aristocrats, and repudiated the clergy. The régimes of Pétain in 1940 and de Gaulle in 1944 mirrored the Revolution's qualified approach to inclusiveness.

In 1995, President Chirac departed abruptly from the official French tradition of excluding and denying Vichy by declaring that Vichy was France. Many in the French Jewish community were pleased, interpreting the statement as a belated assumption of French responsibility for Vichy's part in the holocaust. Among the French who were not happy, however, were some who had been members of the Resistance, who had risked their lives to fight the Nazis, who had from the beginning rejected *Pétainisme* wholeheartedly, who had shown solidarity with all like-minded compatriots, and who to this day refuse any identification of France with Pétain and the collaborators.²¹⁶ They too speak of *la vraie France*, and they mean what my grandfather meant. Chirac's declaration was far from the end of the story, however, for in the fall of 1997, as the trial of Maurice Papon began to grip the nation, both socialist Prime Minister Lionel Jospin and right-wing RPR president Philippe Séguin openly disagreed with Chirac, and warned against the danger of equating Vichy with France.²¹⁷ The difficulty with relegating Vichy to the

pendant le XIXe siècle, in LE DROIT ANTISÉMITTE, *supra* note 5, at 57. For a brilliant and most persuasive challenge to the established notion that the Napoleonic Code in fact embodies the revolutionary spirit, see James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459 (1994). For the view, expressed by numerous French Jews, that French Jews were more attached to the Revolution than non-Jews because the Revolution had emancipated them, see, e.g., JULIEN BENDA, *LA JEUNESSE D'UN CLERC* 36-42 (1936). Accord PIERRE VIDAL-NAQUET, *MÉMOIRES: LA BRISURE ET L'ATTENTE 1930-1955*, at 45 (1955) ("*nous étions des Français fils de l'Émancipation révolutionnaire, citoyens de la République qui avait le droit de tout nous demander*"); ARON, *supra* note 24.

216. This point was made with particular force and beauty by a former resistance fighter who wrote a letter to the *New York Times* in protest against Chirac's pronouncement. I did not record her name or the date, but recollect that it was published shortly after Chirac's speech.

217. See Internet Discussion group, <Law-France@amgot.org>, attachment to "Law-France Digest #67." Jospin heads the socialist party, while Séguin, whose father was killed by the Germans when he was a small child, is president of the Gaullist RPR party, has ties to the right wing, and generally is thought to have presidential aspirations for the year 2002.

An incident illustrative of contemporary France's dilemma arose recently, when the Nazi files on the Jews of Paris allegedly were discovered. A huge, highly publicized debate ensued as to where the files should be stored. Minister of Culture Jack Lang, and Prime Minister Edouard Balladur appointed a Commission to look into the matter. Some

status of an aberration not to be dignified with the name of France or with the mantle of governmental status, however, is that many events cannot be reconciled with such a view.²¹⁸ The first camps in France predated Vichy. Interned were refugees from Hitler's Germany, who later were handed over to the Nazis pursuant to Article 19 of the armistice France signed with Germany. Almost all were to perish in Nazi concentration camps.

The armistice itself was signed before Vichy came into existence.²¹⁹ Even the word "collaboration," which was to become the catchword for Vichy's ignominy, appeared in the armistice, thus also predating Vichy.²²⁰ The word's negative connotations only arose later, however, on October 30, 1940, when Pétain declared his agenda of collaboration with Germany. Although Pétain intended to convey a positive message, the word "collaboration" from then on became tainted with connotations of betrayal and cowardice.²²¹

Nor were Vichy's connections to France's post-war government insignificant. The national collapse of 1940 had stemmed not only from France's military defeat, but also from national discontent with the Third Republic, and de Gaulle consequently was careful to distance himself from the Third Republic when establishing his government after the war.²²² Indeed, the strong executive that France

argued that the files should be destroyed; others that they should be in the archives of the Center for Jewish Documentation and Memorial to the Unknown Jewish Martyr; still others argued against in any way separating Jewish records from those of other French people, and, therefore, for placing them in the national archives. In the midst of this public turmoil, it was discovered, however, that the files were not, after all, the notorious Nazi census files of Paris Jews. A mistake of interpretation had been made. In the context of the public nature of the debate over where to store the files, a high-level governmental decision was made to conceal the new discovery of non-discovery, so as not to further inflame the situation. Perhaps most significant of all, however, is that no-one seemed concerned with the whereabouts or even the existence of the Jewish files that Vichy had compiled. As long as the debate concerned the Nazi German files of the Occupied Zone, it was free to rage openly and unimpeded by governmental interference. See Eric Conan, *Vichy: le rapport qui lève l'énigme sur le "fichier juif"*, in *L'EXPRESS*, July 10, 1996, at 36-42. The files eventually were given to the *Centre de documentation juive contemporaine*. See *supra* note 172.

218. For an excellent discussion of sources of state legality and legitimacy, see generally Joseph H.H. Weiler, *After Maastricht: Community Legitimacy in Post-1992 Europe*, in *SINGULAR EUROPE: ECONOMY AND POLITY OF THE EUROPEAN COMMUNITY AFTER 1996*, 11-41 (William James Adams ed., 1992).

219. For an excellent discussion of this issue, see Alfred Grosser, "Du bon usage de la mémoire," in JUGER SOUS VICHY, *supra* note 68, at 107, 112..

220. I owe this insight to Robert Paxton, who notes that the word appears in Article 3 of the armistice. See PAXTON, *supra* note 6, at 19. For the full text of the armistice, see SIMONNOT, *supra* note 45, at 273-78.

221. See BURRIN, *supra* note 195, at 4.

222. See generally ANDREW SHENNAN, *RETHINKING FRANCE: PLANS FOR RENEWAL 1940-1946* (1989).

eventually adopted under de Gaulle, and that has come to characterize modern French government, had its model in Vichy and stands in stark contrast to the short-lived pre-war French republics.

Vichy's portrayal as a puppet government, rather than an autonomous and sometimes rival government to the Nazi occupier, has been challenged increasingly and compellingly.²²³ For instance, when the Germans began the process of "aryanizing" Jewish businesses and possessions, Vichy plunged into the fray with legislation more rigorous than that of the Germans, for Vichy wanted at all costs to keep "aryanized" Jewish property within French, rather than German, hands.²²⁴ Some of Vichy's antisemitic measures predated any German coercion, and some, particularly the definition of who was a Jew, actually were harsher than the corresponding Nuremberg laws.²²⁵

A little-known but abiding irony of Vichy rhetoric is that a portion of it was created by a Jew, Emmanuel Berl, an eminent French journalist and man of letters, writer and Editor-in-Chief of the leftist publication *Marianne*. Berl was well connected to most of the prominent political figures of both the pre-war and Vichy eras. Pétain paradoxically hired him as a speech writer, before Berl went underground.²²⁶ Although much attached to Pétain as the hero of

223. See KASPI, *supra* note 104; PAXTON & MARRUS, *supra* note 95; VICHY LAW, *supra* note 16. On the other hand, references to Vichy as inauthentically French, because a mere puppet of Germany, continue unabated. See, e.g., MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXTS, MATERIALS AND CASES ON THE CIVIL AND COMMON LAW TRADITIONS, WITH SPECIAL REFERENCE TO FRENCH, GERMAN, ENGLISH AND EUROPEAN LAW 71 (2d ed. 1994), quoting S. E. FINER, FIVE CONSTITUTIONS 27-28 (1979).

224. For a thorough account of Vichy and German aryanization, see *L'aryanisation et seq.*, in KASPI, *supra* note 104, at 112-29. For the role of the private sector's autonomous efforts in eliminating Jews in order to trade with the Germans, see Annie Lacroix-Riz, *Les Élités françaises et la collaboration économique: La banque, l'industrie, Vichy et le Reich*, 159 REVUE D'HISTOIRE DE LA SHOAH 8 (1997).

225. See *supra* notes 5 and 77.

226. The paradox to which I refer here lies in Pétain's very real antisemitism. A commonly held contemporaneous view of Pétain, and one shared by my parents, was that the aged Pétain suffered from senility, but did not have much personal anti-Jewish animus. For a contemporary proponent of this view, see Broussolle, *supra* note 5, at 115, 123. Extensive research has persuaded me otherwise. Reliable evidence of his senility appears to be nonexistent, while unimpeachable, documented evidence of his personal interventions to introduce or heighten antisemitic measures on numerous occasions is plentiful. See PAXTON & MARRUS, *supra* note 95, at 86. See also GALTIER-BOISSIÈRE, *supra* note 205, at 922 (Pétain's reputed deafness, like his reputed senility, also a sham). Cf. *Pétain ne permettrait pas cela*, in 146 REVUE D'HISTOIRE DE LA SHOAH 200 (1997) (misplaced nature of widespread faith in Pétain's decency); Badinter, *supra* note 103, at 46. (Although no official personal declaration by Pétain exists with respect to Jews, Paul Baudouin, who was then Minister of Foreign Affairs, reported that Pétain was by far the most harshly antisemitic of all present at the meeting of ministers convened on October 1,

Verdun, Berl approved heartily of General de Gaulle, and had few illusions about the Germans, or his own treatment as a Jew under Vichy.²²⁷

Perhaps no image of Pétain's rhetoric was more deeply associated with his Vichy agenda than the recurrent one of returning to the soil and working the land. It was also one of speechwriter Berl's inspirations. This presumed bedrock of Pétain's so-called political philosophy played into the hands of Hitler's intention to deindustrialize France and transform it into an agricultural food supplier for Germany. The image soon transmuted into a metaphor antisemites used against France's Jews, as French *pétainistes* sought to establish that Jews were alien to France, no matter how long their families might have been French, because they did not have enough "soil in the soles of their shoes."²²⁸ Indeed, in August of 1942, bags of soil sent from all over France were consecrated as part of a ceremony in which Pétain symbolically identified France with her soil, or soils.²²⁹

Berl also revealed that he originated one of the most famous of all phrases of Pétain's speeches: "The earth [or soil] at least does not lie" ("*La terre, elle, ne ment pas*"),²³⁰ part of Pétain's admonition to the French to return to the sure values they always could trust, and to make themselves invulnerable to the sort of the deceit with which previous French governments and profiteering industrialists allegedly had cheated and deluded them, bringing them to the depths of defeat in 1940.²³¹

1940, to discuss the scope of the antisemitic statute that would go into effect two days later.)

227. BERL, *supra* note 43, at 148. Indeed, Berl went into hiding in July of 1941, much earlier than most French Jews. One can surmise that his proximity to power in Vichy alerted him better than most to the fact that Vichy meant to pose mortal danger to all of France's Jews.

228. This imagery was of such common currency that a French Jewish member of Parliament and escapee from a German prisoner-of-war camp, when received by Xavier Vallat, one of France's most notorious antisemites and head of the infamous *Commissariat général aux questions juives*, on being asked by Vallat what he intended to do now that he was free, responded sarcastically that he would "work the earth." See PIERRE-BLOCH *supra* note 14, at 186. See also CHARLES MAURRAS, *LA SEULE FRANCE* (1941) (avowed antisemite's imagery of Jews as lacking the soil on the sole of their boots to qualify them as French). As Stanley Hoffman points out, paradoxically, "Vichy, which wanted to coax the French back to the land, . . . consolidated instead the business community." Hoffman, *supra* note 192, at 59.

229. For the important role played by the father of the future French president, Valéry Giscard-d'Estaing, in this curious and highly bombastic ceremony, see Pomian, *supra* note 208, at 29.

230. See BERL, *supra* note 43, at 178.

231. All of these accusations had Jews as their subtextual targets, for the qualities named are precisely those which the Catholic Church traditionally had attributed to Jews since at least the 19th century. See ZUCCOTTI, *supra* note 53, at 12; cf. SINGER, *supra* note

Berl disavowed any part of Pétain's antisemitism, although the metaphoric conflation of land, soil and earth with Frenchness became one of the most enduring images French antisemites used to illustrate the Jew's allegedly alien nature. Its hold on the French imagination harked back to stereotyped images of Jews as city people dealing in finance, or as pale ghetto creatures from the East, cloistered from the sun.²³² Years after the war, Jean-Paul Sartre was to evoke and dwell on this same symbolism of the soil in his famous analysis of French antisemitism.²³³

Berl claimed to have been inspired by the image Pétain favored of himself as a peasant from the Artois region. Berl emphasized that the bucolic imagery was far more his own than Pétain's: "I must nevertheless acknowledge that—against all likelihood and, in a certain sense, against all reason,—I insisted more than anyone and even more than the Marshal himself, on this bucolic character."²³⁴ However innocently intended, Berl's words nevertheless were appropriated to sinister ends once they left his pen, as his images were funneled through the antisemitic-laden categorizations prevalent in Vichy France.

Berl's fascinating book chronicles the paradoxical complexities of political choices during the Vichy period, and the complicated, unpredictable nexus of human and political motivations that influenced those choices. After the war, Berl stated that he had not felt it contradictory at the time both to support de Gaulle and yet to continue to work on Pétain's speeches. Berl added, however, that he wondered if there were anyone in the post-war generation who would not judge him either imbecilic or insincere.²³⁵ Berl had an intuitive

21, at 19-26 (antisemitism of French church in nineteenth century).

232. Significantly, the first Jews after the French Revolution to be entitled to full French citizenship were those engaged in working the land. See Jean-Jacques Clère, *Une émancipation tardivement contestée: Les exceptions apportées au principe d'égalité à l'égard des Juifs pendant le XIXe siècle*, in LE DROIT ANTISÉMITTE, *supra* note 5, at 51-72. See also MAURICE BARRÈS, 1 SCÈNES ET DOCTRINES DU NATIONALISME 67 (1925, 1901) (defining the French nation [*patrie*] in terms of soil); MAURRAS, *supra* note 228.

233. SARTRE, *supra* note 176, at 161-62. With respect to German imagery of the soil, cf. Heidegger's inaugural address in May of 1933, upon becoming Rector of Freiburg University, in which he coupled an "attack on objective science, [with] the fervent proclamation of the powers of blood and soil." GAY, *supra* note 30, at 83. For a history of the symbolism of the soil in France, see PAXTON, *supra* note 6, at 200-202. See also NORA, *Between Memory and History*, in REALMS OF MEMORY, *supra* note 37, at 11 ("the traditional French image of memory [is] something rooted in the soil.").

234. BERL, *supra* note 43, at 178. Berl disavowed any direct connection with antisemitism or antidemocracy in Pétain's speeches. See *id.* at 186-253. For a critical view of Berl as a collaborator, see DALADIER, *supra* note 6, at 12.

235. See BERL, *supra* note 43, at 148 ("mais je me demande si aucun lecteur, aujourd'hui, pourra ne pas croire à mon imbécilité, s'il ne met pas en doute ma sincérité").

understanding of posterity's tendency to historical oversimplification, and its difficulty in grasping the ways of thought, and particular combinations of concepts and associations, prevalent in a time not one's own.

His prediction of the contemptuous evaluation the current generation was likely to give him strikes at the heart of flawed conceptual connections the post-war generation has not been accustomed to questioning, for one of our tenets has been unwarranted but unchallenged dichotomizations of resistance from collaboration, of support for de Gaulle from support for Pétain. The conceptual fallacy involved lies in polarizing two positions without considering the possibility of their even partial fusion or overlapping. The tendency has been to associate all Resistance members with being anti-Pétain, and all collaborators with being anti-de Gaulle. These associations and dichotomies reflected actual political positions only in their extreme manifestations. Popular reactions spanned a continuum, and included combinations that may appear mutually inconsistent.²³⁶ As Stanley Hoffmann has pointed out, similar points of view led some to join the Resistance and others to rally to Vichy.²³⁷ In a famous commentary on his own errors in predicting who would become pro- and anti-Dreyfus, Léon Blum warned in 1935 that "[t]he most faulty undertaking of the mind is to calculate in advance the reaction of a man or a woman in the face of a truly unforeseen ordeal. . . . Each ordeal is new and each ordeal reveals a new man."²³⁸

It should be remembered that in 1940, de Gaulle and Pétain were not yet endowed with the symbolism of immutable antagonism they later acquired.²³⁹ Similarly, antisemitism was not necessarily

236. See generally LABORIE, *supra* note 13. In a recent interview, Simone Veil, former judge, cabinet minister under President Giscard d'Estaing, member of the European Parliament, and Auschwitz survivor, expressed a similar view: "*Certains se sont bien comportés, d'autres mal, beaucoup les deux à la fois. Ce n'était pas aussi simple qu'on le présente aujourd'hui.*" L'EXPRESS, Oct. 9-15 1997, at 20. For the identities of a number of socialist and radical party deputies who became collaborators, see REYNAUD, *supra* note 6, at 29 nn.30-32. In particular, Laval himself had been at the far left of the socialist party in 1917. See *id.* at 22.

237. See Hoffman, *supra* note 192, at 42-57. Cf. FRIEDLÄNDER, *supra* note 108, at 14 ("Nazism's attraction lay less in any explicit ideology than in the power of emotions, images and phantasms. Both left and right were susceptible to them.").

238. LÉON BLUM, SOUVENIRS SUR L'AFFAIRE 51 (1935) ("*La plus fallacieuse des opérations de l'esprit est de calculer d'avance la réaction d'un homme ou d'une femme, vis-à-vis d'une épreuve réellement imprévue. . . . Toute épreuve est nouvelle et toute épreuve trouve un homme nouveau.*")

239. See BERL, *supra* note 43, at 149. De Gaulle himself, although condemned to death *in absentia* by Vichy, never entirely repudiated Pétain. It was widely believed that de Gaulle named his son Philippe after Pétain (although Philippe de Gaulle denies this in his recent, 1997 memoirs, see *supra* note 213); and when Pétain was sentenced to death, de Gaulle commuted the sentence to life in prison.

coterminous with pro-Nazism. Pierre-Bloch, a Jewish socialist member of Parliament, notes in his memoirs that, after Germany defeated France, the French fascist and antisemitic group, *Action française*, had to "forget" its original anti-German stance.²⁴⁰ Pétain's first Minister of Justice, Raphaël Alibert, who drafted the first *statut des juifs*, was another example of a perhaps equal mixture of antisemitism and anti-German animus.²⁴¹ While France's right wing was opining "Better Hitler than Léon Blum!", those who had been on the left in the 1930s, the anti-Munich Accord group ("*les anti-munichois*"), including both socialists and communists, sometimes became transmogrified into the leading collaborators of the Occupation.²⁴²

Nationalism, which today we associate with conservative, right-wing politics, had until at least 1914 been a socialist, left-wing position.²⁴³ And indeed, antisemitism, today associated with right-wing political views, was a left-wing phenomenon in nineteenth-century France, a fact that Eugen Weber interprets as owing to, and part of, the left's opposition in the nineteenth century to the development of capital and industry.²⁴⁴ Moreover, as Weber has noted, "the taste for extreme positions [was] often stronger than the attachment to left or right."²⁴⁵ If we look at events of 1940 through the prism of post-war associations and categorizations, we lose sight of the far more murky lines, the intersections of perspectives half a century ago, and we increase the inevitable distance separating ourselves from the Vichy period as it was experienced contemporaneously.

The consequence of this fallacy has been a blocked vision, preventing, inter alia, an understanding of protagonists such as

240. See PIERRE-BLOCH, *supra* note 14, at 106. Political opportunism also led politicians to exploit antisemitism as a means of unifying political support. See ZUCCOTTI, *supra* note 53, at 13; JEAN-LOUIS BREDIN, *L'AFFAIRE* 46-57 (1983).

241. Ironically, although Alibert was far more of an antisemite than his successor, Joseph Barthélemy, Alibert's hatred of Germans ran counter to Pétain's collaborationist objectives, and therefore caused Pétain to dismiss him. See PAXTON & MARRUS, *supra* note 95, at 75, 368.

242. See PIERRE-BLOCH, *supra* note 14, at 165-224, for the unexpected political positions some of his acquaintances espoused after the Occupation. Accord, GALTIER-BOISSIÈRE, *supra* note 205, at 773-916; WEBER, *supra* note 32, at 319 (more recent example of similar political transmogrifications).

243. See WEBER, *supra* note 32, at 263, quoting Charles Maurras, the third number of the daily *Action française*, 23 March 1908, to support the thesis that Maurras and his fellow nationalists were also interested in social reform at that time.

244. See WEBER, *supra* note 32, at 289-90.

245. *Id.* at 51. See also LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 76 (1940) ("extreme points of view have a kind of hidden affinity, as if in travelling away from the middle ground each had completed the same circuit from opposite directions").

François Mitterrand, a hero of the Resistance who also worked for and was honored by Vichy. A scandal erupted shortly before Mitterrand's death in the wake of the revelation of his participation in Vichy, and Pétain's having awarded Mitterrand the *francisque*.²⁴⁶ France's disparate communities plunged into a reassessment of Mitterrand as villain or hero, depending on the particular group's dominant culture, but they continued the binary focus that had generated the initial fallacy.

One who tried to avoid polarization or denying complexity was Elie Wiesel, holocaust survivor and long-time friend of Mitterrand. In his book of interviews with Mitterrand, *Memoir in Two Voices*, Wiesel attempted to have the French President address the issue of his Vichy past, but Mitterrand did so reluctantly.²⁴⁷ Perhaps Mitterrand, like Emmanuel Berl, did not trust posterity to distinguish between complexity and insincerity.

By seeking to understand the contexts of the time, and to scrutinize traditional post-war categorizations for logical fallacies and obfuscations, one can better assess the extent to which those who lived through Vichy were mostly neither heroes or villains, but individuals who, on their own and as part of communities, weighed the trade-offs inherent in their options. Vichy France was fashioned by indigenous forces in anticipation of Nazi domination, at a moment when many in France considered Nazi hegemony to be the wave of Europe's, if not the world's, future, and the costs of further resistance to Hitler more burdensome than survival under fascism. The difficulty of available choices, and even of the perception that choice existed, was rendered all the greater by their inability to know what the future of Europe would hold.

Vichy, like Nazi Germany, illustrates the phenomenon of a preexisting segment of society rising to political power during a period of national crisis. As the millennium approaches and we look back on the eruptive, traumatic century for Europe that is our own century, we might do better to replace *la vraie France*, the concept of a monolithic entity, with an acceptance of *les vraies France*, in the plural.

We define legal and historical questions according to the various prisms through which we see, the varying categories we create and in which we classify selected data. As we cast a backward glance at the millennium, we might appreciate the competing nature of human

246. See PIERRE PEAN, *UNE JEUNESSE FRANÇAISE* (1994). See also *supra* note 209 (regarding the *francisque*).

247. See FRANÇOIS MITTERRAND & ELIE WIESEL, *MEMOIR IN TWO VOICES* 84 (Richard Seaver & Timothy Bent trans., 1996) (1995) ("I feel no obligation to respond to those who, whatever their motives, set themselves up as judge and jury.").

needs, concerns and motives. Competing and incommensurate values exist not only in every society, particularly in our own increasingly globalized and overpopulated world, but also within each human being.

Despite his belief in the inevitable resurrection of his version of *la vraie France*, my grandfather emigrated from France after all, but so late that he had to spend several years in Cuba before he was able to take his family to the United States. Had he not left France when he did, in the fall of 1941, he would have discovered that his choice was not, as his letters show he mistakenly believed, between emigrating and staying in a French prison camp until the end of the war. Had he stayed, he would have been under German control within months, to be deported "eastward," *vers l'est*, as the vague and ominous euphemism of the time went.

He had been able to salvage his movable assets in his first emigration from Germany to France. By June of 1940, when France fell, he was in a prison camp, anxiously contemplating what the fate of his Jewish wife and three children would be under the Nazi occupiers. Unbeknownst to him, his family had fled south from Paris, abandoning what they could not carry.

It was in France that all of his bank accounts were, as he wrote, *bloqués*. "*Bloqués*" means "blocked"—a euphemism for the aryanization process that began with the freezing of Jewish assets. His letters to his wife, once contact was reestablished, frequently refer to his attempts to *débloquer*, or "unfreeze" their bank accounts. In retrospect, his naïveté at this and similar events, and the faith he had in his French business associates and acquaintances, seem hopelessly unrealistic.²⁴⁸ At the time, however, on the contrary, it was the measures at odds with generally accepted concepts of legality and equality under the law that seemed unreal and necessarily ephemeral to those who experienced them.

My grandfather's attempts to reverse French antisemitic measures were of course fruitless. He arrived in Cuba as a man approaching sixty, with four dependents, for what proved to be a five-year stay, his last remaining asset being a bank account in Switzerland.²⁴⁹ My grandfather eventually was able to take his family

248. A recent publication reveals the intensity of the French business community's eagerness to do business with Germany. Even the highly collaborationist Vichy government was distressed, as industry was less intent than the government on keeping profits in France. See Lacroix-Riz, *supra* note 224.

249. Switzerland's policy of anonymous bank account holdings rescued people like my grandfather from dire poverty, but also resulted in the retention by Swiss banks of huge funds at the end of the war, since the overwhelming majority of the anonymous holders and their heirs, having been murdered by the Nazis, were never to claim the funds. These funds, now the subject of heated controversy, recently led Switzerland to disclose the

to the United States, where he found some work as a stockbroker. He lived until 1976, dying at the age of 92. After the war, he returned to Europe at least once a year, but more often to Germany, his original homeland, than to France. I was not privy until 1995 to the letters he had written in 1940 and 1941 to my mother and her siblings from the French internment camps of les Milles and Gurs. I discovered the letters in the far recesses of my father's desk after both he and my mother had died, so I never was able to ask my grandfather or my parents whether his perception of France had changed after 1941, or whether he maintained to the end his earlier, Gaullist vision of the ineluctability of *la vraie France*, and believed that it had in fact reemerged in 1944 with de Gaulle, like a proverbial phoenix, out of the flames of the shoah.

VIII. "Entering the Future Backwards":²⁵⁰ The Trial of Maurice Papon and the Judicial Solution to Understanding Vichy

In the war-time atrocity and Jewish deportation cases of recent years, the French courts have become guardians of a memory that encompasses far more than the defendants themselves, or the acts of which those defendants have been accused. One of the many modern questions Vichy raises is whether its history should be inscribed at all by judicial hands, whether trials are the appropriate vehicle for instructing French youth about Vichy and the holocaust.²⁵¹

identity of holocaust-era investors. In yet another example of entrenched categorizations which both inform one's perspective and impede one's ability to understand others' perspectives, those pressing for Swiss disclosure focused on fifty frustrating years of enduring Swiss bank stallings and refusals to disburse funds that belonged to descendants of holocaust victims. In disclosing the identity of their account holders, however, Swiss bankers saw, rather, the profound changes in their way of doing business which such disclosure seemed likely to entail, for account holder anonymity had become a practice endowed over the years in the Swiss national psychology with a sacrosanct quality. See, e.g., Alan Cowell, *Swiss Offer to Start Fund for Victims of Holocaust*, in N.Y. TIMES, Jan. 8, 1997, at A6. Until recently, the belief was widespread that Swiss bank account anonymity was enacted to protect German Jews when Hitler demanded the transfer to Germany of all foreign-held German Jewish funds. Marc Perrenoud maintains, however, that account holder anonymity was designed to buttress Switzerland's policy of protecting capital that tax authorities from either Switzerland or abroad might attempt to locate. See Marc Perrenoud, *Aperçu des relations économiques et financières de la Suisse avec l'Allemagne*, 163 REVUE D'HISTOIRE DE LA SHOAH 110, 111 n.2 (1998), citing MARCO DURRER, DIE SCHWEIZERISCH-AMERIKANISCHEN FINANZBEZIEHUNGEN IM ZWEITEN WELTKRIEG. VON DER BLOCKIERUNG DER SCHWEIZERISCHEN GUTHABEN IN DEN USA ÜBER DIE 'SAFEHAVEN'-POLITIK ZUM WASHINGTON ABKOMMEN (1941-1946), at 126 (1984).

250. See WEBER, *supra* note 32, at 318 ("We enter the future backwards.").

251. Classes of French schoolchildren attended the Papon trial, as they did Touvier's.

In 1951, the French government began to enact amnesty laws to apply to certain former Vichy collaborators. Amnesty in French is *l'oubli juridique*, "juridical forgetting". The French word for "amnesty" is *amnistie*, derived from the Greek *amnēstos*, which means "forgotten," and is also the origin of the English word "amnesia". The French term for amnesty is defined as a legislative act, mandating official forgetting (*l'oubli officiel*).²⁵²

A countervailing movement in France resulted in the passage of a law in 1964, which aimed to put an end to the national drive for amnesia.²⁵³ The new law provided that crimes against humanity no longer would be subject to any limitations period.²⁵⁴ Such crimes without temporal bounds are known as "*imprescriptibles*," and under French criminal law, imprescriptibility applies exclusively to crimes against humanity. Thirty years later, in 1994, when France's new criminal code entered into effect, the law of imprescriptibility for crimes against humanity was incorporated into the new Criminal Code.²⁵⁵ "*Imprescriptible*" in French connotes both that which is not subject to a statute of limitations, and that which is unforgettable. French law thus decided that the crime of genocide had become legally unforgettable.

The new law of imprescriptibility initially was not intended as an opening to try Vichy officials for their past crimes. The law was intended for German Nazis, not for the French, and more than fifteen years of litigation would be required in Papon's case before he would

See Craig R. Whitney, *Vichy Aide Still Rejects Blame*, N.Y. TIMES, Dec. 8, 1997, at A8.

252. See ROBERT, *supra* note 209, at 54. France's amnesty laws in particular allowed people whose deeds otherwise would have involved up to a 15-year sentence not only to escape trial, but also to run for political office. See also Vidal-Naquet, *supra* note 25, at 87 (describing the amnesty after the Dreyfus Affair as "a time-tested technique for the appeasement of spirits"); EVA HOFFMAN, SHTETL 14 (1997) (explaining negative consequences of "lacunae in collective consciousness").

253. Law No. 64-1326 of Dec. 26, 1964, D.S.L. 1991-92, 1240.

254. The issue of whether crimes against humanity should be without any limitations period continues to divide France. One of France's foremost philosophers, who was also a Jewish Resistance hero, answered the question resoundingly in the affirmative in his book, appropriately entitled *L'Imprescriptible*. See VLADIMIR JANKÉLÉVITCH, *L'IMPRESCRIPTIBLE: PARDONNER? DANS L'HONNEUR ET LA DIGNITÉ* (1986). For a French legal scholar's similar conclusion, see Georges Levasseur, *Les Crimes contre l'humanité et le problème de leur prescription*, 93 J. DE DROIT INT'L 259, 273-86 (1966). For a recent discussion of the issue in the context of Paul Touvier's trial, see Leila Sadat Wexler, *Reflexions on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 L. & SOC. INQUIRY 191 (1995). For an analysis of trials involving crimes against humanity as "the formalized embodiment of the conscience collective," see Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 478, and sources cited therein, especially Émile Durkheim, and Osiel's illuminating analysis of Durkheim.

255. See C. PEN. Art. 213-5 (1994).

be brought to trial, on October 8, 1997, at the age of 87.

In 1981, when François Mitterrand was elected President, he made Maurice Papon his Budget Minister. Michel Slitinsky, a French Jewish holocaust survivor, gave archival evidence to the French left-wing newspaper, *le Canard enchaîné*, which the paper proceeded to publish on May 6, 1981, revealing that Papon had arranged for the arrests and deportations of more than 1,600 Jews when he was second in command of the police for the Bordeaux region (*la Gironde*) during the Vichy period.²⁵⁶ On December 8, 1981, the first complaints were lodged against Papon by relatives of victims, and he requested a *jury d'honneur* to salvage his reputation.²⁵⁷ Composed of former Resistance members, the *jury d'honneur* exonerated him from the charge of crimes against humanity, censuring him only for having failed to resign his position in 1942.²⁵⁸

Despite the gravity of the crime alleged by the civil plaintiffs, the State did not indict Papon. Only two years later did the *parquet*²⁵⁹ bring charges against Papon, in response to public outcry. Perhaps more significant than Papon's 1983 indictment was the State's failure to indict the man who had been Papon's superior in the Vichy police hierarchy, Maurice Sabatier, former *préfet* of the Gironde police, who had given Papon his orders, and who has since died.²⁶⁰ The investigating magistrate (*juge d'instruction*) decided to terminate the investigation of Papon without further action. On February 11, 1987, the Supreme Court dismissed the entire matter because of a procedural error it said the *juge d'instruction* had committed: failing to indict Sabatier, despite possessing sufficient incriminating evidence about Sabatier in the form of a copy of the *jury d'honneur's* verdict,

256. See Eric Conan, *Papon, les Français et Vichy*, L'EXPRESS, Oct. 8, 1997, at 11.

257. Article 85 of France's *Code of Criminal Procedure* provides that one alleging to have been harmed by a crime may file a complaint and become a "civil party" in a criminal case. See C. PR. PÉN. Art. 85 (Dalloz, 1988-89). Pursuant to Article 86, the *juge d'instruction* to whom the complaint is submitted must inform the prosecutor (the *procureur de la République*) of the matter. See *id.*, Article 86.

The *jury d'honneur* was created in 1945 to hear the quasi-criminal charges of "national indignity" against Vichy-appointed officials. For more on this institution, see Mark Gibney, *Decommunization: Human Rights Lessons from that Past and Present, and prospects for the Future*, 23 DENV. J. INT. L. & POLICY 87 (1994); PETER NOVICK, *THE RESISTANCE VERSUS VICHY: THE PURGE OF COLLABORATORS IN VICHY FRANCE* 94-155 (1968).

258. See Eric Conan, *On jugera Papon. Et Vichy?*, L'EXPRESS, Jan. 30, 1997, at 25.

259. The French *parquet* is a kind of prosecution department, integral to the court, rather than separate or independent. See generally MARTIN WESTON, *The Investigation, Prosecution and Punishment of Crime*, in AN ENGLISH READER'S GUIDE TO THE FRENCH LEGAL SYSTEM 119-38 (1991). For a detailed description of the procedural progression of criminal trials in contemporary France, see Bron McKillop, *Anatomy of a French Murder Case*, 45 AMER. J. COMP. L. 527 (1997).

260. See Eric Conan, *Le zèle tardif du parquet*, L'EXPRESS, Nov. 13-19, 1997, at 19.

which had more or less exonerated Papon. The *jury d'honneur's* report stated that "Mr. S[abatier],²⁶¹ former regional *préfet* for Bordeaux, declared to the jury [i.e., to the *jury d'honneur* composed of the Action Committee of the Resistance, the *Comité d'action de la Résistance*] that he [personally] assumed the entire responsibility for the anti-Jewish measures taken in the area under his office's jurisdiction."²⁶²

The Court reasoned that the *juge d'instruction* had violated Article 681 of the French Code of Criminal Procedure by failing to inform the prosecutor, the *procureur de la République*, of Sabatier's amenability to indictment, in light of Sabatier's open declaration of his own responsibility for the anti-Jewish acts. According to the Court, the judge's omission to set Sabatier's indictment process in motion without delay rendered both himself and the prosecutor's office unable to continue to investigate or prosecute Papon.²⁶³

The Court based this startling conclusion (that charges against one man had to be dropped because charges against another also should have been brought) on Article 659 of the Code of Criminal Procedure.²⁶⁴ Article 659, however, far from mandating such a result, merely *allows* the Supreme Court, in such cases as it deems to so require, to decide questions of procedural validity when the issue involves judges: "The Supreme Court also *may* . . . rule with respect to judges."²⁶⁵

On July 8, 1988, a second investigation was undertaken against Papon, and on October 20, 1988, Sabatier was indicted, but he died soon afterwards, in April of 1989.²⁶⁶ In June of 1990, Papon sued the news magazine *le Nouvel Observateur* for including him in a reference to "French accomplices of genocide." Papon seized the occasion to liken himself to Dreyfus: "*je suis le capitaine Dreyfus!*" ("I am Captain Dreyfus!")²⁶⁷ The *juge d'instruction* and public prosecutor's

261. The text of the Supreme Court opinion refers to Sabatier only as "Mr. Sxxxx." See *La Cour de cassation*, Cass. Crim., Feb. 11, 1987, Pourvoi NC 87-80.612, available in LEXIS. Library: World/French Language/Privé. File: CASS ["Cour de cassation"]. Search: "Maurice Papon".

262. *Id.*

263. *See id.*

264. *See id.*

265. C. PR. PÉN. Art. 659 (emphasis added).

266. See Eric Conan, *Le grand absent: Le spectre de Maurice Sabatier, le 'patron' de Maurice Papon, hante les débats de Bordeaux*, L'EXPRESS, Nov. 20, 1997, at 12.

267. The Dreyfus affair constitutes a subtext, often unarticulated but powerfully present, for Vichy's antisemitic persecutions. The notorious antisemite Charles Maurras, when convicted after the war, had one comment: "This is Dreyfus' revenge!" ("*C'est la revanche de Dreyfus!*") See, e.g., Benjamin F. Martin, *Political Justice in France: The Dreyfus Affair and After*, 2 THE EUROPEAN LEGACY 809, 822 (1997). Moreover, after the Court of Appeals initially dismissed charges against Touvier, nearly 200 famous people

office once again decided to request the dismissal of all charges against Papon. The Minister of Justice, Jacques Toubon, however, described as having been in a state of panic at the prospect of the public outcry likely to follow a second dismissal, asked the prosecutor to reverse its decision and to issue instead a *renvoi d'assises*, an order committing the case for trial at the trial court level.²⁶⁸ This was done on December 19, 1995.²⁶⁹

Papon's initial indictment in 1983 presented the issue of whether he could be tried for crimes against humanity, with the lurking subtext of how Vichy might thereby be implicated. In the course of several decisions spanning a number of years, France's courts progressively reinterpreted controlling law so as simultaneously to have Papon stand trial, and yet to avoid confronting the omnipresent, thorny question of how to define Vichy's role in the holocaust. The feat has shown a casuistical skill, and bespeaks of the French judiciary's long, unarticulated and unavowed tradition of creative interpretation.²⁷⁰

Ten years earlier, the Court had sought to avoid tarring France and Germany with the same brush. In 1985, Klaus Barbie had been tried and convicted in France for crimes against humanity which he committed as part of the Nazi German occupying force in France. Barbie was precisely the sort of person French law had intended to target when it made crimes against humanity beyond the reach of French limitations periods. Barbie's lawyer, however, the renowned Jacques Vergès, whose clients have included numerous Middle Eastern terrorists, raised the unpleasant specter of France's crimes in Algeria in the 1950s, suggesting that a guilty verdict for Barbie

signed a protest that they titled "*Nous accusons*," echoing the famous article "*J'accuse*," published in *L'Aurore* by Émile Zola to challenge Dreyfus' conviction. See Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 350-51 (1994).

268. For a chronology of events in the Papon cases, see L'EXPRESS, Oct. 8, 1997, at 11-31. For a summary of the French criminal law process, beginning with the initial investigation by a *juge d'instruction*, see WESTON, *supra* note 259, at 125-33; McKillop, *supra* note 259.

269. The *parquet's* passive submission to politically motivated orders from above in this and other politically sensitive cases have triggered considerable criticism in France and have generated a movement for reform. Both France's present and former Ministers of Justice, Elisabeth Guigou and Robert Badinter respectively, recently commented publicly on the problem. See, e.g., *Mme Guigou met la justice en liberté renforcée*, <<http://www.amgot.org/libe/1029.htm>>; Robert Badinter, *De l'indépendance du parquet*, <<http://www.lemonde.fr/journal/lemonde/971029/une/0110.HTM>>.

270. See *supra* notes 72-75, 99-101, and accompanying text. See also Merryman, *supra* note 100, at 116-17; Pierre Legrand Jr., *Judicial Revision of Contracts in French Law: A Case-Study*, 62 TUL. L. REV. 963 (1988).

necessarily would augur by analogy the same result for those responsible for crimes of torture and murder committed in France's name during the Algerian war of 1954-1962.²⁷¹

In a judicially created phrase that would be repeated until it took on a statute-like resonance, the Supreme Court of France, the *Cour de cassation*, decided that crimes against humanity henceforth would be limited to crimes committed "in the name of a State practicing a policy of ideological hegemony."²⁷² Consequently, France's acts in Algeria would not be amenable to prosecution as crimes against humanity inasmuch as the French government in the 1950s did not meet the definition of "practicing a policy of ideological hegemony," a term interpreted as describing a fascist-totalitarian state.²⁷³

The problem of dealing with Vichy arose in the case of Paul Touvier even before it posed a problem in the Papon case. In 1992, the Supreme Court reviewed a lower court decision to dismiss charges against Touvier, a former leader of the Vichy *milice*, a French paramilitary organization known for its Gestapo-like brutality.²⁷⁴ The lower court had dismissed the charges against Touvier on the ground that he had worked for Vichy, rather than Germany.²⁷⁵ The lower court had found that he could not be guilty on the rationale that Vichy, unlike Nazi Germany, had not practiced a policy of "ideological hegemony" within the Supreme Court's meaning of that term.

Thus, the limitation on crimes against humanity, which had been intended to immunize the French in Algeria, now was being interpreted so as to immunize the Vichy régime from the judiciary's

271. For an excellent analysis of the Barbie trial, including the manifold tactics of Vergès on Barbie's behalf, see Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1324-44, 1355-67 (1989), and sources cited therein. For comparisons between French police brutality in Algeria and Nazi brutality, see MAURICE MACHINO, *LE REFUS* 121-23 (1960).

272. "[A]u nom d'un Etat pratiquant une politique d'hégémonie idéologique." Cass. Crim., Jan. 23, 1997; Papon [arrêt No. 502], in *La Semaine juridique*, No. 14, Apr. 2, 1997, at 22812. For a history of the judicial decisions leading to Papon's criminal trial, see *id.*, the final Supreme Court decision, holding that Papon would stand trial, including commentary thereafter by Professor Jacques-Henri Robert (hereinafter "1997 Papon Decision"). The Supreme Court's definition of crimes against humanity limited the class of potential defendants but simultaneously expanded the class of potential victims. Excluded as a potential defendant was the French army of the 1950s and 1960s, but now included as potential victims were Resistance members.

273. For an interesting discussion of the legal definition "hegemonic" has had historically, see Wexler, *supra* note 254, at 202 n.59 (disputing the accuracy of the unchallenged French judicial interpretation of the term); Wexler, *supra* note 267, at 360-61.

274. For an English translation of the charter of the *milice*, see Wexler, *supra* note 267, at 368-69.

275. See *Arrêt de la chambre d'accusation de Paris du 13 avril 1992*.

reach. This interpretation, however, constituted an implicit recognition that Vichy was a French phenomenon, not German-imposed, something many of the same people who did not want Vichy officials to be prosecuted systematically had been refusing to concede for half a century.

Although the Supreme Court reversed the lower court dismissal in Touvier's case, it nevertheless managed to avoid taking any position on Vichy. Instead, the Court introduced yet another substantive limitation on the definition of crimes against humanity. It held that crimes against humanity require that the acts be committed by a European Axis power, or by a perpetrator acting in complicity with an Axis power.²⁷⁶ This eliminated as a matter of law any inquiry into whether Vichy France could be deemed an *autonomous* perpetrator of crimes against humanity. Thus, the jurors in the Touvier case would be permitted to convict the defendant only if they found that he had committed his crimes for Germany (or, theoretically, for Italy). Touvier had been indicted for what had appeared to be a totally French crime in that he had been charged with having decided on his own to have Jewish hostages shot.²⁷⁷ In light of the Court's rulings, however, his ultimate conviction necessarily implied a jury finding, albeit in the absence of any evidence whatsoever to support such a conclusion, that Touvier had acted on German instructions.

Although the Court had done its utmost to distance Vichy from the judicial proceedings, the nation perceived Touvier's trial as the trial of the state. Schoolchildren attended Touvier's trial to learn about France's role in the holocaust, and news headlines announced the trial's developments in terms of the Vichy state.²⁷⁸ Because Touvier was an important personage in the Vichy-established *milice*, France largely perceived Touvier as a representative of Vichy. The charges against Touvier, however, thwarted this interpretation, in that they focused exclusively on his personal, individual decision to commit murder.

Papon's case seemed better calculated to force the issue of Vichy into the forefront, because Papon's file revealed that from 1942 to 1944 he had ordered and arranged for the arrests and deportations of some 1700 Jews in the Bordeaux area in obedience to explicit, documented orders from his French superiors in the Vichy

276. See Cass. Crim., Nov. 27, 1992, *Touvier*. JCP 1993 G, II, 21977, note M. Dobkine.

277. This incident arose as a retaliatory measure for the Resistance execution of Henriot. See *supra* notes 183-189 and accompanying text.

278. A LEXIS search of headlines revealed innumerable such headlines in the French newspapers and news magazines on line. Libraries: World/PRESSE ("French language"). Search: "Paul Touvier".

government. Papon's acts were state acts, and the state which he had served was Vichy. Thus, it seemed as if the Supreme Court in the Papon case finally would have to confront the issue of whether Vichy had been a puppet government of Nazi Germany or an autonomous entity.

Once again, however, the Court managed to skirt the issue, despite a lower court's explicit attribution of crimes to the Vichy government. In its 1997 decision, France's Supreme Court preferred to rule ambiguously that Papon had been "fully cognizant of the Vichy government's antisemitic policies,"²⁷⁹ but it drew no legal conclusions from this concerning the nature of Vichy. Instead, the Court proceeded to characterize Papon as having worked to further Germany's plan to exterminate Jews, limiting its references to Vichy's antisemitic policies to establishing that Papon had been aware of participating in a scheme to murder. In the Court's words,

[the] illegal arrests, imprisonments and internments, carried out at the request of the German authorities, particularly of the *Kommando der Sicherheitspolizei und der Sicherheitsdienst (SIPO-SD)*, lending its services to the Bordeaux branch of the *Reichssicherheitshauptamt (RSHA)*, the Reich security organization, [the above illegal acts] were accomplished with the active assistance of Maurice Papon, at the time the Secretary General of the *préfecture* of the Gironde, who, by virtue of the wide delegation of power accorded him by the regional *préfet* [i.e., the head of the *préfecture*], exercised authority equally over the [several] services of the police, as well as over the running of the Mérignac camp and services emanating from the war, such as that of Jewish Questions [i.e., an organization set up by Petain to accomplish the elimination of Jews from French public and professional life and from property ownership];

[Further, Papon] fully assisted the German leadership at all stages of the operations; namely, in preparing the arrests and in the practical organization of the convoys; . . . Maurice Papon himself, from July, 1942 to May, 1944, delivered orders for the arrest, internment and transfer of persons to [the] Drancy [camp]; . . . the service which he led always sought to ensure maximum efficiency in the anti-Jewish measures that were in his jurisdiction—such as the updating of files on Jews, or regular communication with the [German] SIPO-SD to provide information about Jews—and sometimes even without waiting for instructions from the central authorities of the Vichy Government, where he requested the same [from Vichy] or from the occupier.²⁸⁰

In yet a third modification of the definition of crimes against humanity, this time tailored to the Papon case, the Supreme Court

279. See 1997 Papon Decision, *supra* note 272.

280. *Id.* at 22812.

further stated that the defendant could be guilty of crimes against humanity even if he personally had *not* adhered to the policy of ideological hegemony.²⁸¹ The Supreme Court to date has never pronounced a conclusion on whether Vichy itself had the "hegemonic ideology" which would qualify it for responsibility for "crimes against humanity" pursuant to the Court's earlier restrictive interpretation of that phrase. Papon's trial nevertheless was perceived by a public and media eager to try Vichy as the trial of Vichy France.²⁸²

For his part, Papon argued, among other points, that he could not be found guilty because he did no more than follow the orders of the then-legitimate government. This legal defense, also proffered by defendants at the Nuremberg trials, is known in France as "the order of law and the command of the legitimate authority."²⁸³ The French Supreme Court rejected this argument when it upheld the lower appellate court decision that Papon should stand trial. The Supreme Court relied on Article 213-4 of the French Criminal Code, pursuant to which "the perpetrator or accomplice . . . shall not be exonerated from responsibility by the sole fact of having performed an act prescribed or permitted by legislative or regulatory provisions or an act ordered by the legitimate authority."²⁸⁴

As the trial of Maurice Papon unfolded in Bordeaux, serious problems persisted. To the consternation of the children of deported Jews, who testified about Papon's role in the murder of their parents and siblings more than half a century ago when he was Secretary General of the Vichy police for the Gironde region, Papon offered indignant testimony that his official work for Vichy was merely a camouflage for his Resistance work. Roger Bloch, a French Jewish survivor and Resistance fighter, stated that Papon had saved his

281. See *id.* The Court noted in particular that the Statute of the international Military Tribunal does not do so and that it also does not require the defendant to have belonged to an organization declared criminal by the Nuremberg Tribunal.

282. Arno Klarsfeld, the lawyer for the civil party accusers, has been quoted as saying that "through Maurice Papon, I shall plead for the conviction of the apparatus of the State of Vichy," *Procès Papon: La Dernière Ligne Droite*, PARIS MATCH, March 19, 1998, at 65, and "[t]he verdict is a condemnation of . . . Vichy." Craig R. Whitney, *Ex-Vichy Aide Is Convicted and Reaction Ranges Wide*, N.Y. TIMES, April 3, 1997, at A-11. A typical French news article is titled, "Papon: the duty of History. We [are] obliged to judge a man, an epoch, a régime." Denis Jembar, *Papon: le devoir d'Histoire—Nous revoilà . . . contraints de juger un homme, une époque, un régime*, L'EXPRESS, Oct. 8, 1997, at 9.

283. "L'Ordre de la loi et le commandement de l'autorité légitime." See 1997 Papon Decision, *supra* note 272, at 22812.

284. "L'auteur ou le complice d'un crime visé par le présent titre ne peut être exonéré de sa responsabilité du seul fait qu'il a accompli un acte prescrit ou autorisé par des dispositions législatives ou réglementaires ou un acte commandé par l'autorité légitime." C. PÉN. Art. 213-4 (1994).

life.²⁸⁵

Michel Bergès, a professor of political science at the University of Bordeaux, who in 1983 personally saved 35 sacks of documents concerning Papon's Vichy activities from the Bordeaux police archives as they were about to be burned, also supported Papon. In a recently published interview, Bergès baldly described the evidence against Papon as both absurd and shoddily concocted. According to Bergès, Papon was a civil servant of only secondary stature during the Occupation, a cog in the administrative machinery. Bergès is quoted as saying that it would be "absurd" to try to attribute the 1600 Bordeaux deportations to Papon, and even more so to try to turn Papon into the French Eichmann. According to Bergès, the documents that the prosecution touted as arrest and deportation orders signed by Papon actually are no more than administrative minutes, and Papon signed them only *after the fact*. In his opinion, the real culprits are the German S.S. men, Knochen and Hagen, both still alive and peacefully living out their days in Germany, as well as Papon's French superiors, the regional *préfet* and others, all of whom, however, are now dead.²⁸⁶

The obstacles to portraying Papon as an unmitigated criminal, and the fervor of the desire to do so, attest to two disquieting phenomena: (1) the use, or misuse, of criminal trials to judge Vichy *qua* government and era, rather than to judge an individual for his personal guilt; and (2) a current agenda to view Vichy selectively, expurgated of its contemporaneous complexities and paradoxes, of the complications, indirections and inconsistencies that thwart easy interpretation. To the extent that the repeal of the limitations period for crimes against humanity rendered Papon's trial incompatible with the current Fifth Republic's established procedural legality, the trial became amenable to attack as political in nature, and an instance of

285. See *Je Considérais M. Papon Comme Sûr*, LE MONDE, February 27, 1998; Lexis Libraries: World/PRESSE. Search: "Roger Bloch."

286. See François Labrouillère, *Papon. Le témoin attendu*, PARIS MATCH, Nov. 13, 1997, at 91. Bergès was partially mistaken: Knochen lives in retirement, but Hagen was tried by a German court and condemned to twelve years' imprisonment, although only in 1980, and only after Serge Klarsfeld had led a public and highly publicized campaign against him. See KLARSFELD, *supra* note 134, *Notes biographiques*, at 541. Bergès' view of Papon's low level of responsibility appears to be shared by Arno Klarsfeld, lawyer for some of the civil parties and son of renowned Nazi hunters Serge and Beate Klarsfeld. Arno Klarsfeld advocated a lesser category of crime against humanity, better suited to Papon's status and deeds. See Eric Conan, *Procès Papon: Il faut en finir!*, L'EXPRESS, Jan. 22, 1998, at 10, 15. Of course, Klarsfeld's position may have reflected principally a strategic concern that Papon not be acquitted. In this context, it is interesting to note that Papon's defense lawyer was scrupulously respectful of the holocaust. He took the position that Papon's role was so minor and passive that his conviction would demean the concept of the crime against humanity.

victor's justice, as well as for misrepresenting an adjudication of state crimes as the trial of an individual.

Critics as disparate as Papon's defense attorney, Jean-Marc Varaut, and Simone Veil, a lawyer, former judge, former cabinet minister under President Giscard d'Estaing, public figure and Auschwitz survivor, condemned allowing an indefinite passage of time for the prosecution of any crime, in view of the inevitable deaths of most eyewitnesses, losses of relevant documents, unreliability of memory, and other reasons for which statutes of limitation are passed, including European defendants' right to a speedy trial as guaranteed by Article 6 of the European Convention on Human Rights of 1950.²⁸⁷ Indeed, the European Convention on Human Rights suggests that France's obtaining Papon's conviction quite literally may mean that Papon will proceed to obtain France's.²⁸⁸

Anticipating the Papon trial's vulnerability to challenges, French Attorney General Henri Declaux declared in October, 1997 that "[i]t is not a State which is being judged here, but only a man."²⁸⁹ The nation's obsessive focus on Papon's trial casts doubt on Declaux's statement, and on whether the trial would have taken place at all if the nation were not struggling with how to define a State.

On April 2, 1998, the criminal trial court, or *cour d'assises*, of Bordeaux convicted Papon and sentenced him to ten years in prison.²⁹⁰ Paradoxically, the court convicted Papon of "crimes against humanity," as it was obliged to do in order to convict him at all, since otherwise the statute of limitations would have run, but the court did not find that Papon had even known of the Nazi genocide during the time relevant to the criminal charges against him. Rather, it held that

287. Article 6 of the European Convention on Human Rights provides that, "[i]n determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable amount of time." European Convention for the Protection of Human Rights and Fundamental Freedoms (Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 464 (1995)). See N.Y. TIMES., Oct. 10, 1977 (World News Briefs). For the opposing view, in support of imprescriptibility, see Levasseur, *supra* note 254.

288. Indeed, after Papon's conviction, his lawyer stated that he intended to "take the case to . . . the European Court of Human Rights." See Whitney, *supra* note 282, at A-11.

289. "*Ce n'est pas un État qui est jugé ici, mais seulement un homme.*" Internet Discussion Group, "Law France, Digest #66," Oct. 13, 1997, *supra* note 217.

290. The court's sentence, including a transcription of almost all of the 764 questions posed to the jury, with the jury's responses thereto, is available on the Internet at <http://www.matisson.com/affaire-papon_02_avril.htm> (hereinafter referred to as "Papon Verdict"). Papon was also ordered to pay 4.6 million francs to the civil plaintiffs. See Fralon Jose Alain, *Maurice Papon est condamné à verser 4,6 millions de francs aux victimes*, LE MONDE, April 6, 1998, available in LEXIS.

Papon had been an accomplice in the "arrests and sequestrations" that were part of the Nazis' war against the Jews.²⁹¹ His crimes were deemed sufficiently grave to qualify as crimes against humanity, yet not grave enough to merit a sentence of more than ten years.²⁹²

The court precluded any holding that directly implicated Vichy by allowing the jury to answer questions that referred exclusively to Germany. Thus, one question which arose recurrently with respect to various victims was whether Papon's acts were "committed within the framework of a concerted plan on behalf of a State practicing an ideological hegemony; namely, in this instance, the German National Socialist State?"²⁹³ As we have already seen, France's prior court decisions had paved the way for the trial court's exclusion of Vichy as a possible culprit. By its manner of framing the jury questions, the court limited to Nazi Germany any jury finding of culpability. A verdict against Papon had to be linked to his conduct on behalf of Germany, because French law had been so defined as to eliminate Vichy as an actor subject to the criminal law category of "crimes against humanity."

France's choice of the judiciary as its vehicle for (re-)constructing memory reflects the judicial trial's unique adeptness at purported constructions of truth. Trials are ideal vehicles for (re-)defining reality, and more precisely, for constructing alleged reality as they purport to *reconstitute* a reality which in fact they set about to *define*. Evidence the court deems admissible forms a closed universe of mathematical-like axioms as the sole point of departure from which legal reasoning can proceed. Facts of record, sanctified by the court's opinion, become immutable and exclusive truths for purposes of legal reasoning—unless a new trial is necessitated by a successful appeal, in which case the process begins again, with a successor court redefining the past anew, but continuing, like its predecessor, to control the power to define, the power to construct significance.

French historian Pierre Vidal-Naquet suggests that his colleagues have studiously avoided writing about Vichy because they have not wanted to confront the issue of Vichy collaboration.²⁹⁴ A recent article published in the *Revue d'histoire de la Shoah*, appropriately titled *The Silence of the Historians*, provides support for Vidal-Naquet's thesis, inasmuch as its author, Rita Thalmann, recounts the many stumbling blocks French graduate students in history have encountered since 1945 if they wished to write doctoral dissertations on Vichy. According to Thalmann, such students until recently could

291. See Papon Verdict, *supra* note 290.

292. See Denis Jeambar, *Un jugement d'opinion*, L'EXPRESS, Apr. 9, 1998, at 5.

293. See Papon Verdict, *supra* note 290.

294. Vidal-Naquet, *supra* note 25, at 145-46.

not find thesis directors and were unemployable in the French government-run university system.²⁹⁵ Thalmann mentions in particular that eminent French historian Fernand Braudel openly explained to his own former student, Léon Poliakov, that he fully intended to thwart Poliakov's professional advancement, saying, "[a]s long as you work on antisemitism, you will not find help from me."²⁹⁶

Vidal-Naquet believes that this attitude, widespread among French historians, explains why the primary historians of the Vichy period to date have been either foreign historians²⁹⁷ or French non-historians, such as the lawyer Serge Klarsfeld, who has become a prolific writer on the subject of Vichy France.²⁹⁸ On the other hand, the French court decisions referred to above in the Barbie, Touvier and Papon cases all attest to a reluctance to confront collaboration during the Vichy period, a reluctance perhaps equally as potent among members of France's judiciary as among its historians. These decisions also reflect a judicial history of circumvention and foot-dragging in cases likely to require such a confrontation.

The explanation for France's privileging its judiciary's role in historicizing Vichy may lie elsewhere: in an underlying function of trials to provide a forum for expiating, channeling, and thereby regulating public passions, as well as in a French tendency to resolve

295. Rita Thalmann, *Le Silence des historiens?*, 160 REVUE D'HISTOIRE DE LA SHOAH: LE MONDE JUIF 154 (1997). Cf. ROUSSO, *supra* note 67, at 265-71. More generally, on the status of French intellectual dissent and dissenters, see PAUL M. COHEN, *FREEDOM'S MOMENT: AN ESSAY ON THE FRENCH IDEA OF FREEDOM FROM ROUSSEAU TO FOUCAULT* (1997).

296. Thalmann, *supra* note 295, at 158. Thalmann also recounts Poliakov's difficulties in finding a publisher for *le Bréviaire de la haine*, considered today by many to be a masterpiece and long translated into numerous foreign languages. That Braudel should have opposed the study of Vichy antisemitism contains its own peculiar irony, inasmuch as Braudel famously assumed the direction of a French historical journal, *Annales*, founded by Marc Bloch in 1929. In 1941 Bloch's name was removed from the journal, and three years later, in June of 1944, he was murdered by the Germans after the French *milice* delivered him to the Gestapo. Bloch's innovative concepts of history can be seen as a point of departure for Braudel's. Thalmann's portrayal of Braudel contrasts with his general reputation for having revered Bloch's memory.

297. American historian Robert Paxton did the first groundbreaking work on the previously unsuspected extent of Vichy autonomy. See PAXTON, *supra* note 6. The profound influence of Paxton's work in France is evident from the fact that he was called by the French court to testify as an expert witness in the Papon trial. See Craig R. Whitney, *Vichy Figure Goes on Trial for Deportation of Jews*, N.Y. TIMES, October 9, 1997, at A-3; Robert O. Paxton, *Vichy On Trial*, N.Y. TIMES, October 16, 1997, at A-21 (Op-Ed). For Paxton's own views of the problems with French historical renditions of Vichy, see PAXTON, *supra* note 6, at xi-xvi.

298. This is particularly noteworthy when one considers the growing role of historians in France. See NORA, *supra* note 37, at 14 (describing contemporary France as a nation which "has changed so radically that it has lost its memory and become obsessed with understanding itself historically").

increasing numbers of issues by recourse to the courts.²⁹⁹ The trial can be an ideal medium for representing memory, so long as the concern is to control meaning according to present perspectives, to concretize a normative position in contemporary France's official interpretive stance vis-à-vis Vichy, and to delegitimize the values associated with Vichy, rather than to understand the past in its contemporaneous, elusive and often paradoxical complexities. Judicially imposed strictures limit both the questions posed and the answers permitted. Even the nature of the lawyers' questions to witnesses and parties becomes defined by the presiding judges' interpretations, for a judge's directions presuppose the judge's unimpeachable understanding of the questions.³⁰⁰ If one posits that such alleged judicial understanding inevitably involves an interpretive component, the idea of objective reality coming to fruition in the courtroom is further undermined. Rather, the emergent version of reality is determined by the judges' array of presuppositions and perspectives, operating within the particular formative framework of the judicial setting.³⁰¹

The judicial context offers more than a contemporary interpretation of Vichy. It also appeals to the demand for moral certainty by virtue of its process of triage with respect to cognizable facts, its rejection of claims that do not fit existing legal prohibitions,³⁰² and the concrete, final nature of its conclusions, set

299. On the expiatory needs of society, see RENÉ GIRARD, *LA VIOLENCE ET LE SACRÉ* (1972), especially *le sacrifice*, at 13-62, and *la crise sacrificielle*, at 63-101. On the expiatory function of trials and of judicial rituals, see Antoine Garapon, *Que faut-il penser du rite judiciaire* [What Should One Think of Judicial Ritual in Law?] (Vivian Grosswald Curran trans.) in *RITUAL AND SEMIOTICS* 23-30 (J. Ralph Lindgren et al. ed. 1997). For the general view that the courts function as last resort when community morality becomes unable to enforce ethical conduct, see Otto Kahn-Freund, *Pacta Sunt Servanda—A Principle and Its Limits: Some Thoughts Prompted by Comparative Labour Law*, 48 TUL. L. REV. 894, 895 ("the importance of legal sanctions . . . is inversely proportional to the strength of the expectation that social sanctions and moral or religious principles will ensure that promises are kept. Is not the modern insistence on the availability of the law for the enforcement of contractual promises to some extent the result of the weakening of religious beliefs and also of the binding force of social norms of conduct?"). For an analysis of what he calls "liberal show trials," see Osiel, *supra* note 254, at 511-14.

300. Despite what has been said above about the French judiciary's inferior role vis-à-vis the other branches of government, French judges have a much greater role in molding the judicial proceeding than do their American counterparts. French court proceedings are not constricted by American-style rules of discovery or evidence.

301. For an excellent analysis of the implications of "bringing [an] *ancien régime* to trial" and the "dilemma[s] raised by successor criminal justice," see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2018 (1997). See also *id.* at 2021 ("The response to past tyranny . . . lie[s] in the domain of politics"); Binder, *supra* note 271 (deconstruction of the Barbie trial).

302. On the depth and breadth of the human longing for moral certainty, see Curran,

forth in immutable words that represent finality and certainty, creating what Peter Goodrich calls the judicial "governance of perception."³⁰³ Trials offer resolution by purporting to supply the answer, while in fact producing merely one of many possible answers. History, on the other hand, represents mutually incompatible interpretive possibilities, complexity and plurality.

The judicial effort to (re)construct is also an effort to define contemporary France by analogy to the past. By understanding the present through analogizing it to the past, the court purports to create identity through differentiation from the *other*.³⁰⁴ Modern cognitive science suggests that human thought proceeds at its most fundamental levels by processes of comparison, of which metaphor is the most powerful. The method is one of assimilating data by comparison and contrast to previously processed, like or unlike data, thereby filtering it in and through already constructed, culturally influenced categories.³⁰⁵

In selecting the judiciary to create or recreate its understanding of Vichy, contemporary France is striving to understand its past by comparison with its present, as much as to understand its present by comparison with its past. Just as memory can be blocked, subject to unconscious denial, to repression, and to willed or unwilled selectivity, so too the judicial process can and even must ignore facts

supra note 181, at 26-28. See also JUDITH SHKLAR, *THE FACES OF INJUSTICE* 8 (1990) (criticizing "the parajudicial conception of morality" and, implicitly, the judicial conception) (quoting JOEL FEINBERG, *DOING AND DESERVING* 85 (1970)).

303. PETER GOODRICH, (*EDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW* x (1995). Cf. George Steiner's definition of the "serious act of signification . . . [as] inexhaustible to interpretative summation. It cannot be anatomized or held in fixed place. Each and every reading, in the larger sense of the term, each and every hermeneutic-critical mapping, remains provisional, incomplete and possibly erroneous." Steiner, *supra* note 37, at 21. For a discussion of legal rhetoric in meaning construction, see Denis J. Brion, *Saying the Law: The Power of Rhetoric and the Rhetoric of Power*, in *STATES, CITIZENS, AND QUESTIONS OF SIGNIFICANCE* 19 (John Brigham & Roberta Kvelson eds., 1997) and Denis Brion, *The Ritual of the Judicial Opinion*, in *RITUAL AND SEMIOTICS*, *supra* note 299, at 1. See also Larry Cata Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDIS. L. J. 611, 626 (1998) (describing the judiciary as creating "stories which distort the input but which serve the cause of moral approbation").

304. As Derrida has shown, identity is no more foundational a concept than difference and, indeed, only acquires its significance through differentiation. See JACQUES DERRIDA, *WRITING AND DIFFERENCE* 278-79 (Alan Bass trans., Univ. of Chicago Press 1978); JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 3-27 (Alan Bass trans., Univ. of Chicago Press 1982).

305. See GEORGE LAKOFF, *WOMEN, FIRE AND OTHER DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 269-303 (1990); STEVEN L. WINTER, *A CLEARING IN THE FOREST: HOW THE STUDY OF THE MIND CHANGES OUR UNDERSTANDING OF LIFE AND LAW* (forthcoming 2000; portions of manuscript on file with author).

and issues which do not fit into the grids previously created for categorizing what is legally cognizable. In this sense, the judiciary mirrors the process of memory Aristotle discussed as *anamnesis*, or willed recollection, but excludes *mneme*, the Aristotelian concept that Raphael Samuel gracefully defines as "the memory which comes unbidden to the surface."³⁰⁶ The "unbidden" may hover in the wings, but does not penetrate into the reification of memory that is the judicial proceeding.

Judicial reification not only displaces and deforms; it also banalizes by eliminating the unspoken, and by equating the judicial record with reality itself.³⁰⁷ This problem generally affects the relation between the judicial event and adjudicated life occurrences, but it is a particularly acute problem with respect to the holocaust. Many holocaust historians have noted the importance of silence in representing the holocaust.³⁰⁸ To reduce the unspeakable to words is to transmute it into material which must fit within a previously constructed system for the assimilation of data, but one that has been constructed of categories that cannot encompass events or ideas of the order of magnitude of the holocaust.

The holocaust, a *cas limite*, illustrates a more general and pervasive problematic of representation, in that it highlights difficulties of transmitting to another that which never can be understood in the same way by the addressee as it is by the addressor.³⁰⁹ This inhibiting feature of communication and of understanding is minimized where (1) the interlocutors share similar

306. SAMUEL, *supra* note 190, at vii. For a discussion of Plato's concept of *anamnesis*, see CASSIRER, *supra* note 36, at 83. Cf. J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1837 (1991) ("[w]hile moral conflict is always with us, we have a natural tendency to reduce the cognitive dissonance that recognition of such tension would produce. In other words, our sense of moral coherence in a system of beliefs is due not only to its actual lack of moral tension, but to a process of forgetting.")

307. Cf. Julia Kristeva, *Psychoanalysis and the Polis*, in THE POLITICS OF INTERPRETATION 98 (W.J.J. Mitchell ed., 1983) ("the modern version of liberty is being... threatened... by a single, total, and totalitarian Meaning"). For law's involvement in the public keeping of memory, see SAMUEL, *supra* note 190, at 24 (referring to MARC BLOCH, FEUDAL SOCIETY (1961)).

308. For a discussion of historical representation of the holocaust, see SAUL FRIEDLÄNDER, PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE "FINAL SOLUTION" (1993). See also Myriam Ruzniewski-Dahan, *La Shoah, entre mémoire et roman*, 162 REVUE D'HISTOIRE DE LA SHOAH 141 (1998) (broader discussion of similar issues); DOMINICK LA CAPRA, HISTORY AND MEMORY AFTER AUSCHWITZ (1998).

309. Cf. WITTGENSTEIN, *supra* note 32, at 2e (Wittgenstein discussing the impossibility of someone else's thinking a thought for him). See also JOHANN WOLFGANG VON GOETHE, FAUST, 1226-27 (1808) ("Ich kann das Wort so hoch unmöglich schätzen/ Ich muß es anders übersetzen."). I am grateful to Peter W. Schroth for bringing these beautiful lines to my attention. See Peter W. Schroth, *Language and Law* (1997) (manuscript on file with author).

cultural backgrounds and (2) the subject of the communication corresponds to the concrete, depending less, rather than more, on what Quine calls verbal stimuli.³¹⁰ Conversely, the problem grows to the extent that (1) mutual foreignness impedes a meeting of the interlocutors' perspectives and (2) the subject matter of the communication is abstract.³¹¹

If metaphor is the powerful tool that cognitive scientists such as George Lakoff claim,³¹² if it is the best hope for transmitting something of the new, of the *other*, it is because metaphor makes use of silence, because the essence of its communicative function is precisely what it leaves *unsaid*. The power of metaphor lies in the blank space that must be filled by the recipient in order to link the two juxtaposed, conflated elements or domains that metaphor presents.³¹³ The sense of reality that strikes the recipient of the metaphor derives from the recipient's ability to connect the metaphor's two elements, which may appear unrelated. Where a metaphor triggers a jolt and an illumination, it is because the recipient's embodied, contingent, experience-based reason permits the recipient to bridge the distance, to supply the unarticulated link, between domains the speaker has connected without explanation.

This means that the reality metaphor achieves is a *sense* of reality; it is a new reality for the recipient who hitherto had not seen a connection between the metaphor's dual domains, but the link, the connection, the understanding newly achieved, depend on the recipient's pre-existing experiences and stored associations, for the latter permit the recipient to create the new information that the metaphor has inspired and instructed.³¹⁴

Charles Sanders Peirce's explanation of the phenomenon he calls "trace" signifies that cognition is dependent on prior experience, determined by previous cognitions. According to Peirce, "the meaning of a term is the conception which it conveys. Hence a term can have no [absolutely incognizable] meaning," and, similarly, "[w]e

310. See WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 27 (1960). For a fuller discussion of this issue, see Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998).

311. See Curran, *supra* note 310.

312. See *supra* note 305 and accompanying text.

313. See Vivian Grosswald Curran, *Metaphor Is the Mother of All Law*, in *LAW AND THE CONFLICT OF IDEOLOGIES*, 65, 67-69 (Roberta Kevelson ed., 1996); see also sources cited therein.

314. See Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 769 (1992) (reviewing THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* (1991) (asserting metaphor is our way of *having* a reality)). Accord Curran, *supra* note 313; Kristeva, *supra* note 307, at 89 (defining analysis as "a construction which . . . triggers other associations on the part of the analysand, thus expanding the boundaries of the analyzable").

have no conception of the absolutely incognizable."³¹⁵ This process permits the extension of previous mental boundaries by building on prior understandings, and building over a chasm left for such construction. It is in this way that the unspoken, the silence in language, is the most constructive force for understanding the new.

Judicial connections, by contrast, do not suggest with faint brushstrokes. They are not like *pointilliste* paintings composed of separated dots that spectators are challenged to connect with their own visions. The judicial decision seeks to bridge every chasm, to supply its own logic, to avoid being elusive, to preclude alternative visions and interpretations. The judicial decision is that which does not encourage or even permit others to invest it with idiosyncratic, deeply personal meaning. The judicial decision must be explained and explicated. It must articulate underlying reasons and justifications. In the French legal system since the time of the Revolution—and in reaction against the pre-revolutionary judicial decision that did not explain, that could order arbitrarily—the judicial decision must be *motivé*, or reasoned.

If, as I believe, communication becomes most effective where it is least controlled by explanation and articulation, as where metaphors unleash their power by allowing interpretants to invest their own life meaning to join two otherwise disparate domains, then the judicial rendition of events banalizes what it describes, because its power resides not in the power to communicate a sense of reality, but to delimit, to control and to define. The judicial decision is justification posing as explanation.³¹⁶ It is monological rather than dialogical.³¹⁷ The power to understand the *other* may never be complete or realizable in an ideal sense, but, insofar as it exists, it depends on fluidity, on the recipient's supplementing the spoken with

315. 1 THE ESSENTIAL WRITINGS OF PEIRCE: SELECTED PHILOSOPHICAL WRITINGS 24, 30 (Nathan Houser & Christian Kloesel eds., 1992). See also Ricœur's concept of trace in TEMPS ET RÉCIT III: LE TEMPS RACONTÉ 177-83 (1985).

316. See Brion, *The Ritual of the Judicial Decision*, *supra* note 303, at 9-10 ("[T]he opinion appears to be an after the fact rationalization of the Result that the court has determined. That is, rather than explaining *why* the court decided as it did, it seems to be an exercise in judging what the court did. In terms of a portrayal of the *act of deciding*, the opinion is hollow.").

317. See Denis J. Brion, *The Semiosis of Liberty*, in REVOLUTIONS, INSTITUTIONS, LAW: ELEVENTH ROUND TABLE ON LAW AND SEMIOTICS (Joel Levine & Roberta Kevelson eds., forthcoming 1999) (manuscript at 11, on file with author) (explaining, according to Bakhtin, "the process of dialogue, the relational event by which meaning comes about—understanding the universe as a process of endless semiosis"). See also Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1341-42 ("The French judicial decision, in its paradigmatic form, possesses a univocal quality that denies the possibility of alternative perspectives, approaches or outcomes.").

his or her unmediated experience by injecting it into a space that has been left open for that very purpose.

Death has been described as "the metaphor through which history takes place."³¹⁸ The history of law, however, in one sense has been "a history of the denial of history."³¹⁹ The horror of the holocaust resides in part in its unknowable and unimaginable quality. To the extent that the holocaust can be made knowable at all to those who did not experience it first-hand, it is through its character of absence, difference and unremitting otherness.³²⁰ Not only is a judicial record, opinion or proceeding none of the above, not only does the judicial proceeding concretize, crystallize, immobilize and fix, in an effort to pin down and control, but in addition, the passage of half a century between the events and the trial renders it yet more reductionistic.

Indeed, Klaus Barbie, known to French Jews and others as the butcher of Lyon, was prosecuted in connection with the deaths of approximately one-thirtieth of the number of people for whose murder he almost certainly was responsible, because, half a century after the events, there were insufficient eyewitnesses and documents to connect him in a legally binding way to anywhere near the number of people he had harmed or the scope of crimes he had committed.³²¹ Similarly, Paul Touvier, a major figure in the viciously murderous *milice*, was charged with the murder of a mere seven Jewish hostages in a trial that had taken more than twenty years to reach the courts.³²²

318. GOODRICH, *supra* note 303, at 38.

319. *Id.* at 39. It has been a denial of history in that "[t]he positivized jurisprudence of common law, the epistemology of doctrine, is tied by precedent to a knowledge that is known in advance, to a prior determination of the forms, classifications, languages and similitudes through which judgment will be repeated." *Id.* at 13.

320. See, e.g., Jonathan Rosen, *Whistle-Stops*, N.Y. TIMES, Feb. 15, 1998, (Book Review), at 8 (reviewing AHARON APPELFELD, *THE IRON TRACKS* (Jeffrey M. Green trans., 1998)) (describing Appelfeld's effective rendition of the holocaust through "excruciating silence, as if language itself were a casualty of the war."). Cf. DE MAN, *supra* note 17, at 17 (discussing "the priority of imagination over perception"), 69 (describing language as alien to writers). For concentration camp inmates' sense of the incommunicability of their experiences, see, for example, Yves Trotignon, *Quelques réflexions sur les témoignages écrits du système concentrationnaire nazi et la communauté juive*, 162 REVUE D'HISTOIRE DE LA SHOAH 127 (1998), and Daniela Amsellem, *Primo Levi: Un Témoin dans les remous de l'histoire*, in *id.* at 43. See also FRIEDLÄNDER, *supra* note 108, at 89 (referring to an "inevitable paralysis of language" as marring holocaust renditions). Paul Ricœur suggests that the depiction of historical horrors requires the narrative of fiction because of fiction's uniquely "quasi-intuitive" character. See Ricœur, *supra* note 315, at 274.

321. Approximately 400, rather than 12,000. See Binder, *supra* note 271, at 1325, 1327-28.

322. It was also noteworthy that the twenty-year delay in prosecuting Touvier occurred after he had twice been convicted *in absentia* immediately after the war, when he was in

In Papon's case, reductionism also came from the state's politically motivated ambivalence about trying him. The public prosecutor's office, in keeping with high-level governmental directions regarding accused Vichy collaborators, approached Papon's criminal investigation in a purposely lackadaisical manner. Leila Sadat Wexler notes that "François Mitterrand . . . admitted that he ordered that the prosecution of certain persons accused of crimes against humanity be slowed,"³²³ and that "[i]t is no secret that all the cases pending against former French collaborators have proceeded inordinately slowly."³²⁴ As Robert Paxton put it after he testified at Papon's trial,

new archival research [after 1970] proved that Vichy France was the only Western European country under Nazi occupation that enacted its own measures against Jews. But this evidence wasn't enough to persuade French leaders to bring Vichy officials to trial. In the 1980's, they quietly blocked cases against Vichy officials from proceeding. For example, President François Mitterrand delayed the prosecuting of René Bousquet, the police chief most responsible for the official French assistance to the Nazis. Mr. Mitterrand preferred to sidestep the issue, having himself (like so many others) served the Vichy régime before joining the Resistance.³²⁵

In addition, French news magazine *l'Express* has accused the *parquet* of failing to identify and locate numerous victims who might have figured in the charges against Papon.³²⁶ Instead of the usual, thorough preliminary court investigation,³²⁷ the investigating magistrate in Papon's case left the work to the civil plaintiffs' lawyer, Serge Klarsfeld, a well-known French Nazi-hunter, whose resources, however, were incomparably scarcer than those at the French judicial branch's disposal. The *parquet* did not search for victims whom Klarsfeld failed to locate, thus ensuring a reduced file for Papon and allowing many of his alleged crimes to be traceless or, in the words of

hiding. See Wexler, *supra* 110, at 323; David Stout, *Paul Touvier, War Criminal Is Dead at 81*, N.Y. TIMES, July 18, 1996, (Obituaries) at B-11.

323. Wexler, *supra* note 254, at 200 n.50. A high-level movement is underway in France to reform the executive's power over criminal cases. Both former Minister of Justice Robert Badinter and current Minister of Justice Elisabeth Guigou are championing reform. See *De L'indépendance du parquet*, *supra* note 269 (decrying "[l]a multiplicité des affaires politico-financières, les entraves rencontrées par certains juges d'instruction dans leurs investigations"); <<http://www.amgot.org/libe/1029.htm>> ("D'une part, la carrière des parquets est gérée par le pouvoir exécutif. D'autre part, en raison de leurs liens avec la chancellerie, ils en reçoivent des instructions. Générales quand elles concernent la politique pénale. Particulières quand elles concernent des dossiers individuels.").

324. Wexler, *supra* note 254, at 200 n.50.

325. Paxton, *Vichy On Trial*, *supra* note 297, at A-21.

326. See Conan, *supra* note 260.

327. See WESTON, *supra* note 259, at 125-33.

l'Express, to remain perfect crimes forever.³²⁸

Judicial banalization involves more, however, than the necessary or even complicit reduction in the numbers of crimes which can be imputed to the defendant in a legally cognizable manner after the passage of time. The Peircean concept embedded in "trace," that no term can be "absolutely incognizable,"³²⁹ implies that, where the transmitted term otherwise *would* be "absolutely incognizable," the recipient's distortion must be overwhelming in order to render the meaning cognizable within the recipient's cognitive framework. This is the process that occurs in judicial memorialization of the holocaust, ultimately resulting in banalization.

Thus, those who testified against Papon helped achieve the verdict of guilt, but Papon's conviction derived from preexisting legal categories unable to assimilate the indirection essential to holocaust truths, unable to receive its original truths. The permanence the witnesses achieved for their narrative, by virtue of its judicial molding, necessarily rested on historical distortion, deformation and reductionism.

For many of the witnesses, holocaust survivors whose parents were murdered when the witnesses were children, the Papon trial was the first time they spoke of their experiences. In his chapter on amnesia and silence, Lucien Lazare describes the "voluntary amnesia" of French child survivors whose parents were caught by the Germans and did not survive. Those who were children at the time in particular chose silence to cloak what had become inexpressible: "Silence permitted [them] to bear the unbearable. It became the shelter, the protection for their refusal to accept the death of their parents."³³⁰

The civil plaintiffs who joined Papon's trial³³¹ were determined to speak in order to invest meaning into their families' deaths; to wrest them, however belatedly, from the anonymity in which they died; and perhaps also, as Lazare believes, because after half a century, "[t]he silence has lasted too long, and has become unbearable in its turn."³³²

328. See Conan, *supra* note 260.

329. See *supra* note 315 and surrounding text.

330. LAZARE, *supra* note 105, at 213.

331. See C. PR. PÉN. Art. 85, *supra* note 257.

332. LAZARE, *supra* note 105, at 213. See also RICŒUR, *supra* note 315, at 211 ("L'impossibilité de passer de la pensée du passé comme *mien* à la pensée du passé comme *autre*. L'identité de la réflexion ne saurait rendre compte de l'altérité de la répétition.") (Emphases in original); and *id.* at 150-51 ("La fonction narrative, prise dans toute son ampleur, . . . se définit à titre ultime par son ambition de refigurer la *condition* historique et de l'élever ainsi au rang de *conscience* historique.") (Emphases in original). But see Bernhard Großfeld, *Language, Writing and the Law*, 5 EUR. REV. 383, 388-89 (1997) (asserting that narration need not be through language).

The witnesses who testified at the Papon trial may have accomplished a personal act of mourning, but their narrative became judicially defined, inscribed and circumscribed.

The power of the unspoken to lead to understanding, to recreate a sense of the past, is in its capacity to generate a dialectical movement between the speaker and the recipient.³³³ Because by their nature they select and explicate, rather than suggest, judicial representations of the past are not equipped to do justice to the effort to convey the past to posterity.³³⁴ When courts decide, they tell us of the law, not of the lived.

IX. The Contemporary Relevance of Vichy

One of the greatest challenges for constitutional democracies today is achieving inclusiveness without demanding unity, without denying or repressing the *other*. This requires an acceptance that not only are the values and discourses of diverse cultural communities within a nation state divergent, they are also irreconcilable and, ultimately, incommensurable. Such a task inevitably strains the capacity of constitutional law to protect diverse constituencies whose self-understandings increasingly are of differentiation and otherness. Ultimately the modern objective of inclusiveness challenges the very meaning of constitutional law, as the eighteenth-century foundational ideals of universalism clash with the late twentieth century's conception of value pluralism.

The challenge of accepting complexity, value pluralism and internal contradiction means eschewing the urge to fuse the diverse into a harmonious, unitary myth of national proportions. It means acknowledging that pluralism will persist, whether recognized or unrecognized. Conversely, it also means questioning accepted categories that create artificial and logically untenable dichotomies, such as *democracy* versus *dictatorship*, *resistance* versus *collaboration*, and *antisemitism* versus *antifascism*.

I have tried to show how democracy's demise in France was realized through a complex interplay of symbols, of categories redefined and renewed, destructive of the past while simultaneously constructed from the past. From the Third Republic's last, suicidal

333. It is precisely this power to transcend time through the narrative structure and suggestive potentials of art which was Proust's achievement in his masterpiece. See MARCEL PROUST, *A LA RECHERCHE DU TEMPS PERDU* (1919-1927).

334. Pierre Nora notes a similar problem in the transition from memory to any historical account: "Memory situates remembrance in a sacred context. History ferrets it out; it turns whatever it touches into prose." NORA, *supra* note 37, at 3. See also Großfeld, *supra* note 332, at 393 ("the step from speech to writing means the disappearance of the human face").

parliamentary debates to contemporary France's trials of accused Vichy collaborators, France has sought, and seeks still, to erect and project a unified and harmonious national identity, albeit one that shifts with each new régime in power. Successive régimes have adopted some truths and rejected others in formulating various identity-affirming discourses.

Like a palimpsest that underlies and colors layer after layer of superimposed texts, Vichy has continued for half a century to penetrate and affect French society, but to date it has not gained admission into the official history of France by most post-war public figures.³³⁵ It is only by recognizing Vichy as an ineradicable and integral moment in French history that Vichy's lessons for democracy can be made viable.

The historical tendency to insist on a unified self-representation plays out beyond the level of denying divergent cultural discourses. It also operates at the level of legal and political theory, in ignoring counterdemocratic strains that lurk within democracies and undermine democratic principles at every level, including the conceptual level.

A legacy of our century's cataclysms, of which Vichy was a part, is the belated understanding that any coherent view of human society must be able to incorporate profound incoherence.³³⁶ Any attempt to inject coherence into the past inevitably will reveal as much about the interpreter as about the events interpreted. Nevertheless, if we are guided and disciplined by Umberto Eco's ideal for textual interpretation—that the best interpretations are those that can accommodate the greatest number of events—we may embark on a road to greater awareness.³³⁷ We may begin to seek possibilities for coexistence without compatibility, for inclusiveness without identity or even commensurability.

Vichy shows us that even nations like our own, constituted as democracies, can be undermined from within, by and through the very democratic processes designed to ensure self-perpetuation, for the most important of all constitutions, the one written in the citizens' minds,³³⁸ is ever renewable and ever destructible, recreated continuously, invested with inevitably transitory meanings that fluctuate with time and history, through the perpetual vagaries of individual and collective perception and sentiment. Vichy shows us

335. See *supra* note 217 and accompanying text. De Gaulle is reputed to have said of Sartre, who openly reviled him, "*Sartre aussi c'est la France*" ("Sartre too is France"), yet never could bring himself to say the same about Vichy.

336. See Curran, *supra* note 181, at 24-32.

337. See UMBERTO ECO, *THE LIMITS OF INTERPRETATION* 49-63 (1990).

338. See CASSIRER, *supra* note 36.

what we have to lose when we allow our legal, political and social narratives and categories to erase many of our truths; when we allow unexamined dichotomies to become tenets of faith; and when we do not observe the erosion of substantive democratic principles because we erroneously assume them to be immutable, perpetual pillars of our national life.